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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1445

ELVIN LEE BYNUM, JOSEPH CORDOVANO, ABRAHAM WRIGHT, LANCE SMALL, NEWBRY MITCHELL, FANNIE MAE GARNETT, JACQUELINE FULLER DYSON, JOHN CONIGLIO, ANGELO MELI, VINCENT ALTAMURA, IRVING BIRNBAUM, CHARLES TUZZOLINO, and LEVIS NEDD,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Elvin Lee Bynum, Joseph Cordovano, Abraham Wright, Lance Small, Newbry Mitchell, Fannie Mae Garnett, Jacqueline Fuller Dyson, John Coniglio, Angelo Meli, Vincent Altamura, Irving Birnbaum, Charles Tuzzolino and Levis Nedd pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on March 26, 1975, which affirmed judgments of conviction previously entered against each of the Petitioners in the United States District Court for the Southern District of New York.

Opinions Below

Following the entry of judgments of conviction in the District Court, the Petitioners appealed to the Court of Appeals. On March 14, 1973, while retaining jurisdiction of the case, the Court of Appeals remanded the case to the District Court, as to all Petitioners, for an evidentiary hearing as to the statutory and constitutional propriety of the manner in which electronic surveillance was executed during the investigatory stage of the case, *United States* v. *Bynum,* 475 F.2d 832 (2d Cir., 1973) [*Bynum I*]. The opinion is reproduced as Appendix A of the Petitioners' Appendix which is filed with this Petition (1a-11a).[1]

[1] The following abbreviations are used in the Petition:

"-a"—is a reference to the Petitioners' Appendix which is separately bound and filed with this Petition. The Appendix contains the three opinions of the Court of Appeals (Appendices A, C and J, respectively), the two opinions of the District Court (Appendices B and I, respectively), the Court of Appeals' Orders denying Rehearing (Appendices D, E and K, respectively), the Remand Orders of this Court (Appendix G) and of the Court of Appeals (Appendix H), and the electronic surveillance provisions of Title 18, United States Code, 18 U.S.C. §§ 2510-2520 (Appendix F).

Where appropriate, the three opinions of the Court of Appeals will be referred to as *"Bynum I"*, *"Bynum II"* and *"Bynum III"*, respectively.

"T-"—is a reference to the seven volumes of trial testimony and exhibits which constituted the Appellants' Appendix in the Court of Appeals upon the initial appeal. These volumes will be certified to this Court.

"H-"—is a reference to the four volumes of *hearing* testimony and exhibits which resulted from the evidentiary hearing as to electronic surveillance which was conducted in the District Court pursuant to the direction of the Court of Appeals in *Bynum I*. These volumes will be certified to this Court.

Following the evidentiary hearing, which had been mandated by the Court of Appeals, the District Court issued its findings and opinion, *United States* v. *Bynum,* 360 F. Supp. 400 (S.D.N.Y., 1973), which is set forth in the Petitioners' Appendix as Appendix B (12a-49a). The Court of Appeals thereafter affirmed the judgments of conviction as to all Petitioners, *United States* v. *Bynum* [*Bynum II*], 485 F.2d 490. That opinion is set forth as Appendix C in the Petitioners' Appendix (50a-75a).

Rehearing (Appendix D [76a-77a]), and rehearing *in banc* (Appendix E [78a-79a]) were denied.

On May 28, 1974, this Court granted certiorari as to all Petitioners, vacated the judgment and remanded the case to the Court of Appeals for further consideration in light of *United States* v. *Giordano,* 416 U.S. —. (*United States* v. *Bynum,* 416 U.S. 903). The memorandum decision of this Court is reproduced in the Petitioners' Appendix at Appendix "G" (108a). Thereafter, upon motion of the Government, the Court of Appeals remanded the case to the District Court for further consideration in light of *United States* v. *Giordano, supra* (Appendix "H" [109a-110a]).

Following an evidentiary hearing, the District Court issued its opinion, findings and conclusions, holding that no suppression of wiretap evidence was required, *United States* v. *Bynum,* 386 F. Supp. 449 (S.D.N.Y., 1975). The opinion of the District Court is set forth in the Petitioner's Appendix "I" (110a-135a). The Court of Appeals affirmed in an opinion, *United States* v. *Bynum,* — F.2d — (March 26, 1975) [*Bynum III*]. The opinion of the Court of Appeals is set forth in the Petitioners' Appendix as Appendix "J" (137a-140a), and the amended order of the Court of Appeals denying rehearing (April 25, 1975), is set forth as Appendix "K" (142a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the search and seizure provisions of the Fourth Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution, which are as follows:

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

This case also involves 18 U.S.C. §§ 2510-2520, inclusive (interception of wire or oral communications). These statutory provisions are set forth in full as Appendix F in the Petitioners' Appendix (80a-107a).

Questions Presented for Review

During the period from January 29, 1971 through March 3, 1971, the government sought, obtained and executed two federal court orders and one extension order for the wiretapping of two telephones utilized by various of the Petitioners. Government agents recorded every communication or attempted communication which passed over those telephones during the effective period of the wiretap orders. The total number of such communications or attempted communications were 3,436. In *Bynum III,* the Court of Appeals held that the extension order was unlawfully authorized, but that the use in evidence of conversations derived therefrom was harmless error (138a-140a).

The following questions were passed upon by the Court of Appeals and are presented for review by this Court:

1. Where the Court of Appeals has held that an extension of an existing wiretap order was unlawfully authorized, and that certain of the petitioners had standing to object to the use of telephone conversations which were secured by virtue of that extension order, did the Court of Appeals improperly conclude that such use was "harmless error"? Where such conversations were actually placed in evidence before the trial jury, and relied upon by the Government as being corroborative, must it not be concluded that the defendants were prejudiced? As to hundreds of conversations seized but not used in evidence, did the Court of Appeals wrongfully reach its conclusion of "harmless error" since it did not consider what, if any, value those additional conversations had been in the investigatory and prosecutorial stages of the case?

2. Did the Court of Appeals erroneously conclude that certain of the petitioners lacked standing to object to the wiretap evidence, merely because their conversations were not directly used in evidence at trial?

3. In view of the other excellent sources of information available to and utilized by the government in this case, did the wiretap orders violate the provisions of 18 U.S.C. § 2518(1)(c) and (3)(c), which prohibit electronic surveillance in the absence of a showing that "other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous"?

4. Did the Government fail to minimize the interception of irrelevant and privileged communications in violation of 18 U.S.C. § 2518(5)? If there is allowed, as to each intercepted conversation, a two minute period so that the

overhearing agent may orient himself to the participants in and nature of an intercepted conversation, is it additionally permissible for the agent to continue interception of every conversation to its conclusion predicated upon the possibility that even an innocent conversation may yield a clue or a fact which may be helpful to the investigation?

5. In the event that the questions set forth *supra* may validly be determined in favor of the government as a matter of statutory construction, were the procedures followed nevertheless violative of the search and seizure provision of the Fourth Amendment?

Statement of the Case [2]

Following a lengthy trial, judgments were entered against the various Petitioners in the United States District Court for the Southern District of New York, convicting them upon one count of conspiracy to obtain and sell narcotics in violation of 21 U.S.C. §§ 173 and 174, and 21 U.S.C. §§ 4705(a) and 7237(b). The Petitioner Nedd was, additionally, convicted of unlawfully carrying a firearm in the commission of the conspiracy, in violation of 18 U.S.C. § 924. Each of the Petitioners received substantial prison sentences.[3]

1. The Alleged Conspiracy

The substance of the Government's case is set forth in *Bynum II*, at 52a-57a, and we shall repeat only so much of it here as is necessary to place the electronic surveillance within a factual context.

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[2] A key to the abbreviatitons used in this Petition is set forth in footnote 1, *supra*, at p. 2.

[3] The sentences imposed upon the various Petitioners ranged from five to thirty years imprisonment, and certain of the petitioners were, additionally, fined. The specific sentences imposed are set forth in *Bynum I* at 3a, fn. 1.

The Government sought to establish a conspiracy which extended from January, 1970 to April, 1971. The substance of the charge was that the conspirators (the Petitioners herein and certain others) sold and purchased cocaine and heroin to and from each other for ultimate sale to third parties.

The Government's proof relied primarily upon the testimony of George Stewart, an alleged participant in most of the conspiratorial events. In December, 1970, in the midst of the alleged conspiracy, and following a series of arrests, he agreed to become an undercover informant for the government. He thereafter reported on a day-to-day basis concerning the activities of the other alleged conspirators. He also gave the agents samples of narcotics, narcotics paraphernalia, and a view of a substantial amount of money intended for the purchase of narcotics.

In addition to Stewart's daily reporting, the government engaged in visual and electronic surveillance of the various alleged conspirators.

The electronic surveillance took two forms:

As part of his collaboration with the government, Stewart tape recorded ten of his telephone conversations with certain of the Petitioners;

Additionally, during the period from the end of January, 1971, through the beginning of March, 1971, pursuant to a court order, Federal agents tapped two telephones used by various of the Petitioners, particularly Bynum and Garnett. As a result, thousands of telephone conversations were overheard and recorded. Of these, eight were received in evidence at the trial. Six of these were between Bynum and Cordovano and two were between Bynum and Stewart. The Government claimed that all of these conversations corroborated Stewart's version of events (Gov. Exs. 1-4, 8, 13-15; T. 3193-3202, 3208, 3223-3227).

With Stewart's cooperation, Government agents were able to observe various meetings between Stewart and other Petitioners, as well as between other Petitioners. The agents were thus able to corroborate the fact, but not the purpose, of such meetings.

Following his own indictment, one of the alleged conspirators, Charles Moody, was recruited as a government witness. He corroborated Stewart's testimony concerning one of the many transactions recounted by Stewart. That transaction allegedly involved an unconsummated sale of narcotics by Moody and the Petitioners Birnbaum and Feroldi to Stewart and the Petitioner Cordovano.

Moody also testified concerning one of three sub-plots which the government successfully argued were part of the larger conspiracy charged by the indictment. He claimed that he, and the Petitioners Cordovano and Bynum and one Feroldi,[3a] planned the unconsummated robbery of a Washington, D.C. liquor store for the purpose of obtaining cash and/or narcotics which were allegedly stored there.

The second sub-plot involved a similar robbery attempt to obtain monies and/or narcotics from an individual in Manhattan. This aspect of the proof was dependent upon the testimony of Stewart, who inculpated Petitioners Bynum, Cordovano and Nedd.[4] Stewart's testimony was partially corroborated by the robbery victim, who attested that such a robbery had occurred and that he recognized Petitioner Nedd as being one of the robbers.

The third sub-plot, also dependent for its proof upon Stewart's testimony, involved an alleged plan to murder one Robert Wollack, who, at the time, was thought to be a government informer.

[3a] John Feroldi was a defendant at trial, but is not a party to this petition.

[4] At the end of the government's case, the Court dismissed charges against Michael Lebbers, one of the alleged participants in this robbery plot.

2. The Wiretaps

A. The Sequence of Events

A concise summary of the history of the wiretaps is found in the following excerpt from *Bynum II*:

> "The Government was authorized by District Judge Anthony J. Travia, Eastern District of New York, on January 29, 1971 to overhear and electronically record telephone conversations at the home of the defendant Garnett, Bynum's girlfriend; her home was the site of subsequent meetings and cutting operations of the defendants. The order was based on an affidavit stating that four reliable informants had indicated that Bynum was engaged in a large drug distribution business and used Garnett's phone in this business. The affidavit further recited that Bynum had corrupted state and federal officers, that he had a previous narcotics conviction, and that he was reputed to have caused the killing of some 18 people. The order authorized the wiretap for 20 days and contained the statutory directive (18 U.S.C. § 2518(5)) that the interception of communications be conducted in such a way as to minimize the interception of communications not otherwise subject to interception.[5] On February 12, 1971, a second wiretap[6] was authorized on another phone in the Garnett residence for 20 days duration.[7] The tap on the first phone was extended by Judge Travia on February 18, 1971 until March 3, 1971 so that it ex-

---

[5] The agents called this the "W" tap.

[6] The agents called this the "Q" tap.

[7] [This footnote is part of the original text of the opinion]:

> Bynum learned of the first proposed wiretap *before* Judge Travia signed the authorization. He had the second phone installed and the agents learned of this through their tap on the first phone.

pired on the same day as the second tap.[7a] For five weeks these phones were monitored and conversations were recorded, eight of which were introduced at the trial and played for the jury" (65a-66a).

B. The Wiretap Applications and Orders

(*i*) *Necessity.* Each of the wiretap applications alleged that "normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used" (H. 613, 647, 688). The affidavit annexed to the first application belied this assertion (H. 617-630). At substantial length it set forth information concerning Bynum and his alleged operations known personally to the investigating agents. Additionally, it detailed current and recent information supplied to the government by informants who had, or were then engaged in, personal transactions with Bynum concerning each of the matters under investigation, and who were intimately connected with his alleged operation.

(*ii*) *The Target.* Although the wealth of information described, *supra,* was known to the Government at the time of the first application, all of the applications and all of the orders described the target of investigation in such terms as "Elvin Lee Bynum and others unknown" (e.g., H. 603, 611-12). Neither of the documents identified any of the other targets by name, although the conversations of many of them were intercepted.

(*iii*) *The Minimization Requirement.* The first and second wiretap orders each contained a provision that ". . . this authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not

[7a] In *Bynum III,* the Court of Appeals held the extension tap to have been unlawful since it had not been authorized by the Attorney General of the United States (138a-140a).

otherwise subject to interception under Chapter 119 of Title 18, United States Code . . ." (H. 607, 642). The third order (i.e., the extension of the first order) did not contain such a provision (H. 681-4).

As each application was presented to the issuing judge, and on various other occasions, he engaged in unrecorded conversations with Mr. Updike, the supervising attorney who had signed the various applications.

It was Mr. Updike's hearing testimony that "there was no explicit discussion of the issue of minimization . . ." with Judge Travia (H. 166). Indeed, Updike's testimony included the following responses:

> "I don't think I ever used in a conversation with Judge Travia the word minimization" (H. 323).
>
> * * * * *
>
> "Q. And as a matter of fact you never went back and asked Judge Travia to modify the minimization requirement? A. No, sir, I didn't.
>
> "Q. And you never went back and asked him to eliminate the minimization requirement, did you? A. No, sir.
>
> "Q. And you never went back and sought his counsel on how to meet the minimization problem, did you? A. No, not expressly.
>
> * * * * *
>
> "Q. As a matter of fact, during that period of time, you never once discussed with him the problem of how you can meet the minimization requirement, isn't that right, Mr. Updike? A. That's correct" (H. 324-327).

On the other hand, Judge Travia's recollection was that "I wanted to make sure that they [the agents] were aware

of the minimization rule, and all the other things * * *" (H. 411). He further testified:

> ". . . I was constantly in touch with them to make sure that they complied with certain provisions of the order, particularly the minimization rule.
>
> "In other words, I wouldn't want them to be on an open phone for every conversation possible if they could comply with the minimization requirements of the order, and it was during that surveillance by me that I would be talking to Mr. Updike and to the agents and there were a number of times — this didn't involve one, two or three" (H. 409-410).
>
> * * * * *
>
> "Q. Did you admonish them that they should minimize this recording of conversations? A. I don't know whether I ever used admonished, but I would, in talking to them about this, tell them to be very careful with respect to this particular part of the order, because I think that is a very important part of the order—minimization—and I would make sure that they were not just promiscuously listening to or recording everything that goes on but when it became such a far flung situation, involved so many people, and this we knew right away practically, then I had to admonish them, if you want me to use that word, to be careful and to use good judgment and good discretion and you just can't, when you are in such a situation say, you turn it on and off. You don't know what is going to happen, and there are certain situations where you have to give a little latitude and in this case from what I heard I had to give latitude.
>
> "Q. Now, as distinguished from recording of conversations, there was the earphone mechanism they could also listen on. A. They wouldn't be able to know what is on the recording until they read it or heard it back but on the listening device they could hear it right then and there.
>
> "Q. Did you admonish them that they should attempt to minimize their contemporaneous listening? A. I think that involves the whole thing. When we are talking about minimization, I think it involved everything. In fact, listening more than recording, or both. To me they are both equally as important. One follows the others. That's all" (H. 441-442).

(*iv*) *The Reporting Requirement.* Each of the wiretap orders directed that "Charles B. Updike shall furnish the Court with a report [at five day intervals] following the date of this order showing [1] what progress has been made toward achievement of the authorized objective and [2] the need for continued interception" (H. 607, 642, 684).

In fact, reports bearing the following dates were filed by Mr. Updike:

February 4, 1971 (H. 634)
February 8, 1971 (H. 636)
February 16, 1971 (H. 676)
February 18, 1971 (H. 678)
February 24, 1971 (H. 717)
March 1, 1971 (H. 721)
March 8, 1971 (H. 723)

Attached to each such report were the wiretap log entries for periods as noted in each report.

With the possible exception of the report for February 16, 1971, none of Mr. Updike's written reports complied with the Court's order that such reports show "the need for continued interception". The indication of that fact in the February 16, 1971 report was only in the form of Mr. Updike's statement that " . . . an application to extend the present authorization beyond its termination date of Febru-

ary 17, 1971, to March 13, 1971 is now being processed in Washington" (H. 678).

None of the written reports indicated to Judge Travia that there was a minimization problem. All of the reports assured him that "none of the calls included privileged communications." All of them included superficial and conclusory statistical summaries with regard to the submitted logs.

(*v*) *The Privileged Communication Requirement.* As noted, *supra,* each of the written reports assured Judge Travia that "none of the calls included privileged communications."

It appears that both Mr. Updike (H. 245) and Judge Travia (H. 432) are in agreement that it was orally indicated to him at the outset of the tapping operation that the calls of an attorney might be intercepted. Judge Travia recalls that he repeatedly admonished that the agents should not listen "to anything that might involve privileged communications" (H. 410; see also, H. 411). He assumed that the agents would point out to him any attorney-client call or call involving an attorney that might appear in any logs that were delivered to him; however:

> "Q. Did they volunteer to you at any point that a particular call involved an attorney? A. I don't think it took that tack at all. I don't recall that" (H. 432).

Judge Travia could not recall any situation where Updike or an agent pointed out a call on a log and said, "Here is a conversation which involved an attorney" (H. 434). He was never asked to determine whether any particular conversation was privileged (H. 435).

Judge Travia did not recall ever having been informed that an intercepted telephone conversation in fact involved a lawyer (H. 438). He concluded, based on Updike's reports, that no privileged communication had been intercepted. He assumed that he, himself, would resolve any legal issue concerning the possible existence of an attorney-client privileged call (H. 447).

C. The Execution of the Wiretaps

(*i*) *The Listening Post and Equipment.* The room in which the monitoring agents performed their task was called the listening post. Since the listening post was located two or three miles away from the premises at which the subject calls were located (H. 339), a telephone line was leased from the telephone company for the purpose of carrying the telephone conversations to the listening post (H. 151).

Whenever the receiver was lifted from the subject telephone and whenever an incoming call started the telephone ringing, a red light would illuminate in the listening post and automatic equipment would immediately start recording whatever was on the line. When the receiver was replaced, even momentarily, the red light would go out and the recording equipment would stop (H. 340, 347-8, 374-8, 469). On any outgoing call, a pen register recorded the number being dialed (H. 347-8, 374-6). As the tape on one recorder ran out, another recorder took its place so as to avoid any gap (H. 340, 377). As reels were filled with tape, the monitoring agents made complete duplicate copies of each reel on other recording machines.

(*ii*) *The Monitoring Agents.* Agent Francis J. Pryal testified as a witness in behalf of the government.[8]

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[8] At the hearing, the following stipulation was read into the record by the prosecutor:

> "It is stipulated by and between the government and the defendants through their counsel that each of the monitoring agents who performed such duties in connection with these authorized interceptions would testify in a manner similar to that of Inspector Pryal if called as a witness" (H. 485-486).

Pryal was one of a number of inspectors brought in from out of town to monitor the wiretaps. This was his first wiretap assignment (H. 346). His permanent station is in Washington, D.C. A day or so before the commencement of his duties with respect to monitoring the tap, the chief inspector told him in Washington, D.C., that he was coming to New York to man a wiretap, and "that there was a possibility of an integrity matter of one agent and he might be in some way involved with Mr. Bynum" (H. 338, 365).

When Pryal arrived in New York, he was supplied with a looseleaf packet which merely gave him the names of various individuals alleged to have been involved (H. 367). He and each of the other monitoring agents were on duty for five 12-hour shifts per week (60 hours) over the entire course of the wiretap operation (H. 340, 352, 396). Each tap had two men working on it at one time, so that when two taps were operating there would usually be four men in the listening post (H. 353).

The equipment was so set up that there was a set of earphones for each man on a team so that both members of the team would listen to the same conversation at the same time. Both men would make notes and then they might confer on what the log entry should be, although there were many times when there was no such conference (H. 353, 356). Neither man on a team was superior to the other (H. 362).

After typing the logs, symbols would be placed next to certain entries with a red pencil. The symbol "N" stood for the judgment that the call was possibly narcotics related. The symbol "IS" stood for the judgment that the call was possibly related to internal security. Although there are other marks on the logs, Pryal could not recall what they signified (H. 357-364).

During the course of the interception, he became familiar with the voices of many of the persons, including but not limited to Bynum, Donna (a teenage Baby sitter), Garnett, Mrs. Bynum, Cordovano and Wright (H. 470).

During the intervals between calls, Pryal would discuss the subject matter of the calls with his fellow agents (H. 475). Aside from the question of whether various calls were narcotics or crime related, they would, for example, joke about the baby sitter's calls with her boyfriends (H. 401-403), and mention that they had just been through a 30-minute gossip session (H. 475). He heard conversations which he would consider odd or ridiculous, but which he conceded the speaking parties would view differently (H. 476). Similarly, he conceded that he heard conversations with respect to the sex lives of the conversants (H. 476).

Pryal is not an attorney (H. 476). He was never introduced to Updike, the supervising attorney, during the course of his duties (H. 372).

(iii) *The Supervising Attorney.* Mr. Updike had a staff of six to eight lawyers under him, but it does not appear that any of them assisted or participated in the supervision of these wiretaps (H. 27). Prior to this case, he was never before in charge of an electronic surveillance operation (H. 168). The extent of his preparation for his task was that he had "generalized discussions" in the lunchroom with some of his colleagues;[9] he consulted the Justice Department manual; and he examined the wiretap statute (H. 163-164). He did no research (H. 165); he did not read the Congressional report with regard to the wiretap statute (H. 259); and he did not consult the Department

[9] Some of his colleagues gave him advice that total recordation of conversations might or would be in violation of the law (H. 163).

of Justice with a mind toward finding out what other prosecutors had done in his situation (H. 260).

(*iv*) *The Instructions to the Monitoring Agents.* At the outset of his direct examination by the Government at the hearing, Mr. Updike stated his instructions to the monitoring agents as follows:

> "And with respect to the actual operation of the intercept, my instructions were that they were to record everything except what any inspector felt was a privileged communication, and as to those they were to report to me when anything of that nature occurred or felt something of that nature occurred."
>
> "But the instructions were that they were to record and monitor at the start all communications that came over the telephone" (H. 33).

The fact of the matter was that Mr. Updike did not, himself, give instructions to the monitoring agents. Indeed, he did not meet with any of them before they commenced their duties, nor does he have a recollection of ever talking to any of them on the telephone. His only contact with the monitoring agents appears to have been when he briefly visited the listening post, and:

> "I actually borrowed the headset for, you know, two minutes or three minutes on a couple of occasions when I was over there, because I had never listened to a wiretap before and I thought I'd see what it was like" (H. 174; see also, H. 34, 160, 162).

At various points in his hearing testimony, Mr. Updike implied that the monitoring agents had had discretion with reference to what they ought listen to (H. 38-39, 168); however, he eventually conceded that the monitoring agents,

themselves, were never enlightened as to this alleged discretion.[10]

Mr. Updike's testimony conforms with that of Agent Pryal who testified that he never read the wiretap statute, nor did anyone ever discuss with him the concept of minimization (H. 392).[11]

According to Mr. Updike, the otherwise uncommunicated discretionary powers of the agents would be driven home to them solely by virtue of their sheer boredom:

> "Q. Then you were counting on the agents being bored and taking off their earphones as a vehicle

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[10] "* * * My instructions and my dealings were with Inspector Bitzer and Inspector Taylor and to the extent that the monitoring agents received any instructions they received them from them and not directly from me.

* * * * *

"Q. Well did you tell Inspector Taylor or Bitzer to use their own judgment in what instructions they ought to give to the monitoring agents? A. I didn't tell them that, but I certainly understood that within certain limits they would do that. They wanted to know what those limits were and I, in my instructions to them, gave them those limits.

"Q. And those were the limits to which you referred at the last hearing, to record everything unless they felt that they were dealing with a privileged communication? A. That's correct.

"Q. And if they felt that to contact you? A. That's correct.

"Q. And that was the sum total of the instructions that you gave those two inspectors to pass along to the monitoring agents? A. That's correct" (H. 266-267).

[11] "Q. Did you ever have any discussion with anyone concerning any limitations that were placed on you in your conduct of this surveillance? A. The instructions that we received were given by Mr. Taylor, maybe Mr. Bitzer, and the only limitation that I can recall was a privileged communication. We were not supposed to record any privileged communications.

* * * * *

"Q. Did anyone ever tell you that aside from the attorney calls, there were times when you should not listen in on conversations? A. No, sir" (H. 391-392).

by which the minimization objective of the statute would at least in part be accomplished? A. Yes, I think that is a fair characterization" (H. 170).

(v) *The Non-Coordination and Non-Communication of Information.* It is our submission that, in order to properly fulfill the minimization obligation, those on the front lines of the monitoring operation, as well as those charged with the supervision of that operation, should be aware of all current developments in the investigation. The record in this case demonstrates that both Mr. Updike and the monitoring agents were kept in a state of vincible ignorance with respect to the information necessary for the proper fulfillment of their respective functions.

We have the following from Mr. Updike:

(1) Although he was aware from the outset that two teams, totalling eight agents were on duty for visual surveillance on an around-the-clock basis with respect to this case (H. 45), he never looked at even one of the visual surveillance reports generated by these agents during the period beginning before and ending after the existence of these wiretaps (H. 113), although he knew that such reports existed (H. 216).

(2) Although there was a continual flow of information through the visual surveillance, the informants, and the wiretaps, he was aware that he did not receive the information from these various sources. The only clear cut direction that he gave with respect to information that he was to receive shortly after it was obtained was "potentially privileged communication" (H. 214-218).

(3) He did not receive the logs created by the monitoring agents until four or five days after the event, and he issued no instructions that he receive daily reports with respect to the wiretapping (H. 279). The fact of the

matter is that there were only three copies of the logs in existence: the original remained at the listening post; a carbon copy went either to Inspector Bitzer or Taylor who kept it at their own office in another building, and a xerox copy went to Judge Travia. There were no other copies and Mr. Updike never had a copy of his own (H. 183-185). It appears that, when the five-day time limit came around for the required letter-report, Inspector Taylor or Inspector Bitzer would come around with the statistics that were to be presented to Judge Travia and with *Judge Travia's copy* of the logs (H. 177-180). It was Judge Travia's copy that Updike perused. He conceded that he did not look at every page, nor did he make any notes on the copy nor did he make any independent notes (H. 186).

(4) Similarly, Mr. Updike made no effort to have the listening post located in a place which would be convenient to him (H. 148-153).[12]

It appears that he never examined the logs with a view towards ascertaining the relative evidentiary value of the information contained thereon. Toward the beginning of the investigation, his excuse was as follows:

> "* * * I did not at the time I first examined the logs go through them with a view to seeking out things of high evidentiary value, because as of that time it was our fervent hope with respect to this investigation, that we would be able to conclude it with a seizure of drugs at an appropriate time and place as part of a cutting operation at which virtually everyone in the conspiracy would be present or otherwise associated with it, and that was the game plan, as of that time" (H. 232).

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[12] The wiretaps were transmitted to the listening post via leased telephone lines.

His reason for not examining the logs carefully during the latter half of the investigation was as follows:

> "Before this case went to trial, there were very, very few conversations that fell into that category [high evidentiary value] because we had by that time machine guns and pistols and murder plots and chloroform and corroboration of various kinds of conspiracies that we had begun investigating with this wiretap, so I have not examined the logs with a view to that end that I have just described" (H. 230).

Similarly, the monitoring agents were kept in a state of ignorance. Aside from receiving a sheet of names at the beginning of the investigation, they received no other written document through to the point of the termination of the electronic surveillance, nor did they receive any briefing (H. 372).

(*vi*) *The Failure to Maintain Records.* Mr. Updike conceded that no record was made of: his visits to the listening post (H. 92); the visits of himself and the inspectors to Judge Travia (H. 102); his telephone conversations with the agents (H. 154-155), when he, himself, saw the logs (H. 176); who else may have seen the logs (H. 176); when the actual transcripts were created (H. 177); who had access to those transcripts (H. 177); and no notes were maintained with respect to his supervision of the electronic surveillance (H. 191).

Similarly, the government was not able to point to even one conversation that was not overheard *in toto* by the monitoring agents.

There is no indication that, during the course of this surveillance, anyone undertook to make a serious analysis of the products of the wiretap to determine whether a substantial number of telephone calls were being seized in violation of the minimization requirement (H. 87, 94, 103).

D. The Product of the Wiretapping

As noted *supra*, at p. 7, only eight of the intercepted telephone conversations were placed in evidence at the trial. The Court of Appeals noted that all of the telephone conversations which came over both tapped telephones were monitored *and* recorded (71a-72a). It found, however, that such a total invasion of privacy was unavoidable under the facts of this case (68a-73a). We submit that the uncontroverted statistics which were supplied to the District Court and specified to the Court of Appeals belie that conclusion.

In treating solely the *number* of conversations that were more than 2 minutes in length, the lower courts distorted the extent of the interceptions of irrelevant conversations. Begging the patience of this Court, we shall now demonstrate, as we did for the lower courts, that the gross amount of time involved in the lengthy calls far exceeded that involved in the shorter calls. In doing so, we shall utilize the even higher breakoff point of 3 minutes, thus giving to the government the more than 10% of the calls (280) which were between 2 and 3 minutes in length.

(*i*) *Number of Instances a Call was Made to or From One of the Tapped Telephones.* The first wiretap ("W" tap), including its extension, was operative for 34 days. The second wiretap ("Q" tap), which coincided with the last days of the "W" tap, was operative for 20 days.

The logs produced by the monitoring agents noted every instance in which a call was made to or from the telephones in question (H. 754 *et seq.*). As noted by the District Court, this included busy signals, wrong numbers, etc., as well as completed telephone communications (H. 1810).

The district court's figures (H. 1810), which were identical to our own (H. 1247), are as follows:

"W" tap calls of all types	— 2,604
"Q" tap calls of all types	— 832
Total calls of all types	— 3,436
Busy, etc.	— 1,378
Completed communications	2,058

(*ii*) *Completed Communications Broken Down According To Duration.* We provided the District Court with an exhaustive statistical analysis, on a call by call basis, noting the duration of the various completed telephone calls, as well as the parties to those calls (H. 1176-1270).

These statistics, which were used by the District Court, demonstrate that of the 2,058 completed communications, 501 were 3 minutes or more in duration (summarized at H. 1247; detailed at H. 1255 *et seq.*). Donna, the young teenage babysitter who cared for the Bynum-Garnett infant son after school, accounted for 144 calls, 73 of which ranged from 3 minutes to 30 minutes or more (H. 1250-3).

The telephones in question were located in the home of the petitioner Garnett. A review of all the calls reveals that she was a participant in a very large percentage of the conversations. In order to avoid the retrospective arguments that: a) Garnett was a conspirator and, therefore, warranted closer listening, and b) the agents needed a certain amount of time to react, the defense prepared a chart of her telephone conversations which *exceeded 10 minutes in length* and in which the other conversant was not named as a conspirator in the case (H. 1254). Neither the District Court nor the Court of Appeals adverts to this analysis in their opinions.

Objectively, and without regard to the content, there are two ways to view the gross number of completed telephone calls. The first is purely by reference to the number of distinct conversations held. The second is by reference to the amount of time which elapsed during these conversations. We did both.

Calls less than 3 Min.	1557 (76.5%)	31 hrs (30.5%)
Calls more than 3 Min.	501 (24.5%)	71 hrs (69.5%)
Total Calls:	2508 (100%)	102 hrs (100%)

The defense contended that the vast majority of calls which exceeded 3 minutes were absolutely irrelevant to the legitimate objectives of the wiretap operation. In order to avoid a quibbling contest, we singled out for the court's particular attention, the telephone conversations of the babysitter, Donna, and her teenage friends, as well as the telephone conversations of the defendant Garnett and her friends. As noted *supra*, we limited ourselves to Garnett calls which were 10 minutes or more in length and to which no other conspirator was a party. We ignored the numerous other lengthy innocuous calls. That computation revealed the following:

Category	*Number*	*Time* [13]
Donna Calls (3 min. +)	73	14-½ hrs.
Garnett Calls (10 min. +)	47	19 hrs.
	120	33-½ hrs.

Thus, utilizing this limited number of clearly innocent Donna and Garnett calls, we find that they account for *one*

[13] It must be understood that the time figures given here, are all taken from the statistics supplied to the District Court by the defense and have never been contested. They represent actual conversational time as recorded in the logs of the monitoring agents.

third of the total interception involved in all calls (102 hours, *supra*, p. 25) that passed over the two telephones during the entire period of the interception operation.

E. The Privileged Communications

By order of the District Court, many of the hearing exhibits were placed under seal and may be read only by the parties to this action and their attorneys. These include the wiretap logs, transcribed conversations and summarized conversations. Such exhibits were grouped in volumes 3 and 4 of the bound hearing proceedings (H. 754-1826) which were before the Court of Appeals and are being certified to this Court.

There are set forth at pp. H. 1549-1684, the transcribed versions of 67 telephone conversations to which attorneys [14] were parties. At H. 1546-1548, we advised the lower Court as to the specific 42 conversations which we considered to fall within the attorney-client privilege. Although we deem it inappropriate to discuss the content of such conversations in a public brief, we respectfully urge this Court to review that part of the record for the purpose of assessing the nature of the conversations involved.

The hearing established that Judge Travia was never advised of the fact that such conversations were seized. In his testimony, Mr. Updike admitted that, although he claimed to Judge Travia that no privileged conversations had been seized, he never told the Judge that this opinion was based on the fact that he (Updike), relied upon the *non-lawyer* agents to point such conversations out to him (H. 253).

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[14] None of the present attorneys for the Petitioners were in any way involved.

Reasons For Granting The Writ

Introduction

This Petition raises pressing and substantial questions of interpretation with regard to the Federal statutory scheme for court ordered electronic surveillance. Moreover, a number of the issues involved raise important questions under the search and seizure provisions of the Fourth Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution.

In *Bynum I*, at 9a, the Court of Appeals described the problems presented in this case concerning the minimization of irrelevant interceptions, as follows:

> "It seems evident that we are faced here with weighty issues of first impression in this court which may well be raised again in other trial and appellate litigation."

Indeed, there can be no doubt that the Court has predicted accurately.

In *Bynum III* (137a), when confronted with the fact that a substantial portion of the wiretapping herein had been unlawfully authorized, the Court of Appeals, for the first time, introduced into the case the additional issues of harmless error and standing. This was so despite the fact that, of the eight wiretapped conversations introduced into evidence, four came from the illegal tap. Moreover, the Court ignored the fact that the hundreds of other conversations seized through that admittedly illegal tap were, according to the District Court and the prosecution, of substantial value to the investigation which led to the indictment herein. The Court of Appeals did not even deal with that issue, although these facts were shown and argued on the appeal and on the petition for rehearing.

It was only after many years of resistance that Congress was moved to permit the use of court-ordered electronic surveillance, and then only under the most stringent requirements. It is, perhaps, a natural tendency for law enforcement officers to press to the outer limits the strictures which have been placed upon them. Then, the outer limits become the norm and the press for wider limits becomes the new goal. The assurances given while attempting to induce the legislation are forgotten.

A narcotics conspiracy, particularly of the type alleged by the government in this case, presents a substantial and awful danger to the community. Law enforcement officers who seek to combat that danger by means of a wholesale violation of fundamental rights merely compound the evil effects of the underlying problem. Those who are willing to wink an eye at such lawless behavior encourage it and lay the groundwork for institutionalized and more pervasive oppression. A line must be drawn. We respectfully submit that those who were charged with the supervision and execution of the wiretaps in this case went far beyond that line. There is hardly a significant aspect of the legislative controls upon electronic surveillance which was not flouted.

Our Statement of the Case, *supra,* is unusually long and detailed. However, in the face of the substantial omissions in the opinions of the Court below, there is no other way for us to place before this Court the reality of what occurred here. While fictions are not unknown to the law, it would be improper to place the stamp of regularity upon the procedures followed herein.

I. The Wiretap Applications Failed To Establish Necessity For the Issuance of An Order.

If one message is sent by the governing wiretap statute, it is that a wiretap is a serious invasion of privacy which Congress was willing to tolerate only under the most

stringent conditions. One of those conditions is that a wiretap must be a last resort. Section 2518(1)(c) requires each application to include:

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

Subdivision (3)(c) of that same section requires the issuing judge, before permitting a wiretap, to make a finding that:

> "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

As noted *supra,* at p. 10, the wiretap applications contained the boilerplate allegation that "normal investigative procedures appear unlikely to succeed", but the assertation was contradicted by the plethora of successful investigative techniques then in use against the Petitioners. Moreover, the evidence at trial revealed that, on a number of occasions during the investigatory stage, agents were in possession of first hand information which would have enabled them to swoop down on Bynum's residence and catch him, with his confederates, in the act of packaging large amounts of narcotics. For reasons never revealed, they did not do so.

The Court of Appeals, in rejecting our arguments, said:

> It is further urged that applications for the wiretaps were defective in failing to establish that resort to this means of surveillance was necessary as required by 18 U.S.C. § 2518(1)(c). A reading of the detailed affidavits which were submitted in support of the wiretap and which form part of this record, indicating reason to believe that Bynum had engaged in the corruption of officials and violence

against informants, and that he was a long time narcotics violator, amply supports the issuance of the orders here made (*Bynum II*, at 66a-67a).

The Court's holding utterly ignores the statutory prerequisites. The issue is not whether Bynum was probably committing crimes, but rather whether other investigatory techniques would likely have been successful. The detail contained in the "detailed affidavits" established that very fact.

II. The Government Grossly Failed to Minimize The Interception of Irrelevant, Innocent Telephone Conversations.[15]

18 U.S.C. § 2518(5) provides, in pertinent part, as follows:

> "Every order *and extension thereof* shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . ." [emphasis added].

The opinions of the lower Court fail to mention that the agents who actually monitored the intercepts for five weeks were never told and did not know that there was such a thing as minimization (*supra*, pp. 18-19). They do not mention that the supervising attorney, who was supposed to be seeking to ". . . formulate . . . detailed screening instructions" (*Bynum II*, 70a). only glanced at the logs when he would file them every five days or so with the issuing

[15] *Supra*, at pp. 24-26, we set forth the facts which show that the overwhelming bulk of the interceptions, in terms of number and time, were irrelevant. *Supra*, at p. 26, we show that the agents indiscriminately intercepted privileged conversations.

magistrate (*supra*, pp. 20-22). It is no wonder that the attorney observed no pattern in the daily, lengthy and frequently personal conversation of a young girl with her friends. In his hearing testimony, while seeking to explain his decision to seize all conversations, he claimed, for example, that the interception of a conversation might later prove "useful" in counteracting an alibi that "could have been offered" at a subsequent trial (H. 111-2). Another theory offered by him was that he wished to preserve the calls, "so that there could be no accusation at a later time that the Government had made selective recordings in the conduct of this investigation * * *" (H. 167).

Of course, the nature of an electronic surveillance operation is such that innocent calls will, to some degree, be overheard. It is no doubt true, as well, that the nature of the crimes under investigation and the shrewdness of the individuals under investigation may decrease the ability of the monitoring agents to avoid interception of irrelevant conversations. However the magic incantations of "organized crime", "corruption", and "sophisticated targets" cannot legitimately be used to frustrate the Congressional intent.

It seems to us that an intelligent examination of the conduct of monitoring agents must commence with two inquiries: what was their expressed state of mind and how much of their time was, in fact, spent listening to irrelevant conversations? Here, we know that the agents had no thought of minimization; they didn't even know there was such a thing. The supervising attorney thought any conversation was properly subject to interception if it was "useful" in revealing the habits and whereabouts of the target, regardless of whether it was directly related to the investigation and regardless of whether the unwitting informant was an innocent third party. In response to the second question, we can indulge every reasonable presumption in favor of the government's decision, and still come

up with the fact that most of the total telephone time during the existence of these taps involved lengthy, innocent conversations.

Perhaps the most serious flaw in the Court of Appeals' analysis is the double standard in which it indulges in exercising "the acuity of hindsight" (*Bynum II*, at 72a). Thus, in the course of eventually absolving the agents for their extended interception of the babysitter's personal telephone calls, the Court states: "Of course, in making this retrospective judgment that Donna calls were innocent, we enjoy the acuity of hindsight".

On the other hand, hindsight of an incredible sort is utilized to indulge in findings adverse to the petitioners. Thus, in depicting the complexity of the operation which the wiretapping was meant to pierce, the Court states, "The conspiracy here unveiled was not limited to drug peddling, but included larceny, robbery and murder among its ingredients" (*Bynum II*, at 68a). The fact is, however, that none of the last included criminal ingredients was known at the institution of the taps. Indeed, the alleged murder plot did not come to light until late April of 1971, almost two months after the taps had terminated (*Bynum II*, 56a). That these factors would not, in any event, have entered into the selectivity of the monitoring agents is demonstrated by the fact that they were not briefed on the other developments in the case (*supra*, pp. 18-19, 20-22).

The second important, but erroneous, item of hindsight by the Court of Appeals is the alleged fact that Bynum knew that his phones were tapped, practically from the outset (*Bynum II*, at 69a). While it is true that Bynum testified at the trial that someone from the telephone company had told him his telephone was tapped, his knowledge in this regard cannot justify the government's actions, since this revelation came to light for the first time at the trial. Moreover, are we to conclude that a person's right

to privacy is diminished if he knows his phone is tapped or that the right to privacy of innocent third parties is similarly diminished?

Any resolution of the issue we raise here must be based, in large part, upon a recognition of the principles announced by this Court in *Berger* v. *New York*, 388 U.S. 41 (1967). There, the Court struck down, as violative of the Fourth Amendment, a New York eavesdrop statute. It did so on a number of grounds, one of which was that the statute permitted indiscriminate seizures of conversations having nothing to do with the criminal conduct under investigation. The Court stated, at page 59, that:

> The statute's failure to describe with particularity the conversations sought gives the officer a roving commission to "seize" any and all conversations.
>
> • • • • •
>
> During such a long and continuous (24 hour a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation.

The possibility of such an "indiscriminate" seizure of innocent conversations sank the statute.

With this issue in mind, Congress provided, in 18 U.S.C. § 2518(5), that:

> "Every order and extension thereof shall contain a provision that the authorization *to intercept* . . . shall be conducted in such a way as *to minimize the interception* of communications not otherwise subject to interception under this chapter . . ." [emphasis added].

This provision, the purpose of which is "to prevent improper invasion of the right of privacy provided by the Fourth Amendment and to curtail the indiscriminate seizure of communications",[16] is mandatory. As was noted in *United States* v. *Eastman,* 326 F. Supp. 1038, 1039 (M.D. Pa. 1971):

> "Such an invasion [of privacy] by law enforcement officers in the line of duty is to be tolerated only *in strict conformity* with the Constitution and applicable statutes" (emphasis added).

See also: *Application of United States,* 427 F.2d 639, 643 (9th Cir. 1970) ("If the Act is to survive a constitutional challenge, . . . it can only do so by giving the Act as limited a construction as is warranted by the language used.")

Directly in point are a number of cases. In *United States* v. *George,* 465 F.2d 772 (6th Cir. 1972), a provision in the wiretap order calculated to minimize the interception of conversations not otherwise subject to such interception was unknown to the executing agents, who therefore failed to comply with it. Instead, the agents "automatically" turned the recording machine on whenever a call was made to or from the phone being tapped—a fact identical to the facts of this case. The Sixth Circuit held as follows:

> "Thus, it is obvious that the evidence in this case obtained by electronic surveillance, allegedly pursuant to the statute, was obtained in a manner which violated the terms of the order authorizing the electronic surveillance. The motion to suppress could and should have been granted in accordance with the statute.

[16] See *United States* v. *Focarile,* 340 F. Supp. 1033, 1044 (D. Md. 1972).

> "We, therefore, hold that wiretap evidence secured without regard to the limitation set forth in the authorization order is inadmissible."

The conviction was therefore reversed, as this one should be.

Also in point is *United States* v. *King,* 335 F. Supp. 523 (S.D. Cal. 1971). There, the surveilling agents recorded every conversation which took place over the tapped wire.[17] Stating that "indiscriminate interception [of communications] by Government agents is an invasion of privacy not to be tolerated",[18] and that "the object of minimization is to prevent the wiretap from turning into the kind of general search and wholesale invasion of privacy decried by the Supreme Court in *Berger* . . . and *Katz* . . .",[19] the court held that the mandatory minimization requirements had not been met.

Here, of course, every call was recorded without the slightest gesture toward minimization of irrelevant calls. The comment of the court in *United States* v. *Focarile, supra* at 1046, is therefore in point:

> [T]here can be essentially two different types of violation of the minimization requirement of § 2518(5). The first type of violation would be the one committed if there had been no attempt at all to minimize the interception of "innocent" calls. This first type of violation would obviously be a blatant violation of the provisions of Title III and, in addition, would probably violate the precepts of the Fourth Amendment.

We submit that it is beyond dispute that the wiretap surveillance in this case constituted a violation, as clear as it was gross, of both the statute and the order.

[17] The tap there was less intrusive than the one here. There, only forty-eight hours of conversation was intercepted; here, it was more than twice that.

[18] 335 F. Supp. at 543.

[19] 355 F. Supp. at 541.

III. If the Agents Did, in Fact, Minimize the Interception of Conversations to the Extent Possible, and if Their Efforts Represent a Good Faith and Sufficient Compliance with the Requirements of Title III, then the Wiretapping in this Case Constituted a General Search of the Type Prohibited by the Fourth Amendment of the United States Constitution.

As was indicated in *Berger* v. *New York*, 388 U.S. 41 (1967) and *Katz* v. *United States*, 389 U.S. 347 (1967), and as confirmed by *Kaiser* v. *New York*, 394 U.S. 280 (1969), the seizure of telephone conversations must conform to the requirements of the Fourth Amendment.

In *Berger*, this Court found that "few threats to liberty exist which are greater than that posed by the use of eavesdropping devices," 388 U.S. at 63, and declared that "the need for particularity and evidence of reliability . . . is especially great in the case of eavesdropping." 388 U.S. at 56. Where electronic surveillance is concerned, the Court has recognized a "heavier responsibility . . . in its supervision of the fairness of procedures than in any other area" *Osborn* v. *United States*, 385 U.S. 323, 329, fn. 7 (1966). Significantly, the opinion in *Berger* several times referred to *Stanford* v. *Texas*, 379 U.S. 476 (1965), a decision which imposed special Fourth Amendment requirements where the First Amendment is concerned. See 388 U.S. 41 at 53, 58.

Both the Government and the courts below placed a great deal of emphasis upon the nature of the crime charged in this case in order to justify the practically total seizure of conversations. It is claimed that, at any time, a conversation might turn to a topic of evidentiary value. Evidentiary value is not limited to the plans or description of a crime. It is aimed at finding out who a target's associates are, where he has been, where he is, where he will be, and where he is not. Any person who calls in or out is treated as a potential conspirator unless and until he is established to be otherwise. Every conspirator and potential conspirator has all of his conversations monitored and recorded *in*

toto because of his status as such. This is so notwithstanding the fact that only one person (Bynum) was named in the wiretap application and order. Even if it is concluded that a person using the phone is not a legitimate target of the tap, or that a conversation is not going to be of any evidentiary value, the conversations in question are nevertheless recorded and permanently preserved. All of this is performed under circumstances where the executing agents —the agents who manned the taps—were never told that there was an obligation to minimize.

It is beyond belief that this Court intended to allow lengthy surveillance of this type merely because the tap might pick up a lead. It seems clear from *Berger*, *Katz* and *Osborn*, that only short and highly discriminating intrusions will be tolerated. As was said in *Berger*, "we cannot forgive requirements of the Fourth Amendment in the name of law enforcement" (388 U.S. at 62).

In reversing a conviction in *Von Cleef* v. *New Jersey*, 395 U.S. 814 (1969), this Court held:

> "While [United States v.] Rabinowitz [339 U.S. 56] made the principles governing searches accompanying arrests unfortunately hazy, see Chimel v. California [395 U.S.] at 766, we have no hesitation in concluding that the action of the police here in combing a three story, sixteen room house from top to bottom, and carting away several thousand papers, publications, and other items cannot under any view of the Fourth Amendment be justified as 'incident to arrest'." (395 U.S. at 816).

If anything, the instrusions involved in *Von Cleef* pale in comparison to those of the present case.

We respectfully submit that the wiretapping herein was a clear violation of the reasonableness requirements of the Fourth Amendment.

IV. The Use of Conversations Derived from the Admittedly Illegal Extension Tap Was Not Harmless Error.

18 U.S.C. § 2515 mandates that evidence derived from an illegal wiretap cannot be utilized in any court proceeding:

> "§ 2515. Prohibition of use as evidence of intercepted wire or oral communications.
>
> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication *and no evidence derived therefrom* may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." *Added* Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

In *Bynum III*, the Court of Appeals held that the defective authorization procedures rendered the "extension" wiretap illegal. Four conversations obtained by the illegal extension order were introduced into evidence at the trial. Nevertheless, the court held that the introduction of these conversations was harmless as to Garnett (who was the subscriber, but not a party to any of the conversations) as well as to Bynum and Cordovano (who were involved in all four).[20]

This Court's rulings on harmless error are clear, *see*, e.g., *Chapman* v. *California*, 386 U.S. 18 (1967), and the finding of the Court of Appeals clearly ignores the statutory and constitutional prerequisites to such a finding.

[20] Since, in *Bynum II*, which dealt with the minimization issue, no reference to harmless error was made, the finding of harmless error in *Bynum III* applies only to the product of the extension order.

An analysis of this case, as it has wended its way up and down the federal judicial system, discloses that a question of the utmost importance is involved. That question is whether the Government shall be tolerated to make different factual assertions at different times, depending on the issue it must then meet, and to cover up the indefensible by the camouflage of a claim of harmless error. The Court of Appeals sustained that delayed claim without reference to the investigatory use of the many conversations seized by the extension tap. Moreover, the Court ignored the extent to which the Government relied upon the four conversations in order to corroborate the testimony of its indispensible witness, Stewart.

A very brief recitation of the Government's bizarre changes of position will set up the backdrop for our argument.

In *Bynum I*, petitioners argued that the Government had failed to minimize its interception of non-pertinent communications. The Government responded that petitioners were unable to point "to a single conversation improperly overheard" (Government Brief in *Bynum I*, p. 25), even though every conversation had been monitored, and asserted that the overhearing of a non-pertinent conversation was, at most, an "occasional" event (Id., p. 26). Thus, faced with a minimization argument, the Government asserted that virtually every conversation (all of which were intercepted) was important to its investigation. No claim of harmless error was made or even hinted. The Court of Appeals, faced with an incomplete record, ordered a hearing on this issue.

At the hearing ordered in *Bynum I*, the Government believed it had to show that no real minimization was

possible, since virtually every conversation had evidentiary value. In support of that thesis, the Assistant United States Attorney who had supervised the wiretap, swore as follows:

> 1. That "even calls that relate[d] to where Mr. Bynum would be at a certain time or where someone with whom he was associated would be at a certain time, those calls were frequently followed up by the use of surveillance teams,[21] and it is precisely on the basis of that kind of a call that surveillances were conducted" (H43-44); and
>
> 2. That conversations engaged in by a teenaged baby-sitter, Donna, were valuable to the investigation because she sometimes took messages for Bynum and Garnett which "provided significant leads" and because even when talking with her teenage friends,[22] she would sometimes describe Bynum's activities, which "provided useful leads and useful information"—"leads that could be followed by the surveillance agents . . . ." (H32); and
>
> 3. That intercepted conversations would show the location of the callers, and that this was "useful as a check on surveillance information or [to] supply information to surveillance teams. It is the kind of information that can be, although of its nature basically innocent information, *it can be of extreme evidentiary value* . . . " (H111) (emphasis added); and
>
> 4. That even information, gleaned from the wiretapped conversations of others, showing Bynum was not at home was of some potential value; and, astoundingly
>
> 5. That even when nothing was learned from an intercepted conversation, the interception was valuable to the investigation in the sense that the investigators had learned that nothing was learned (H219-20).

[21] There was a two-way radio system between the wiretap monitoring post and teams of surveillance agents (H395).

[22] A portion of Donna's chatter with her peers dealt with the sexual activities of themselves and their friends. The recording machine, oblivious to the privacy of such conversations, memorialized every word.

In light of this type of testimony, it should come as no surprise that the Government claimed that it had intercepted 1,767 calls of "evidentiary value" to its investigation (H103), and raised no claim of harmless error.[23]

The District Court, in its opinion on the minimization issue, made clear that the intercepted conversations were of substantial value to the Government:

> "Moreover, no criticism can validly be leveled at any of the intercepted conversations which were transcribed by the Government—the inculpatory nature of these with picayune exceptions *is patent*." (14a, fn. 3) (emphasis added)

In *Bynum I* and *Bynum II,* Petitioners argued that the wiretapping herein had not been necessary, and claimed that the evidence indicated that the Government had a chart, which identified all of the alleged members of the conspiracy, even before the wiretapping commenced. The Government responded as follows:

[23] A total of 3,436 calls were intercepted (H1467), but this figure is somewhat deceptive, since it includes busy signals and, predictably, calls to the weather bureau, each of which was meticulously, if not religiously, monitored by the agents in their court-ordered effort to minimize the interception of non-pertinent conversations.

> "Defendant's arguments that 'this chart' was part of 'the original application' (H78) ignores the very pages cited (See H78 and 445) *and is utterly false.* The chronological reports (GX-21 at H1065-1174, H510-512, 597) make abundantly clear the processes of identifying nearly everyone on the chart, and this identification process *was substantially based on information obtained from the wiretap.* (Government's Supplemental Brief—*Bynum II*, at p. 19, fn.) [emphasis added]

Consistent with its earlier position, the Government argued in its *Bynum II* brief, for example, that "Indeed, *even when talking to her friends*, Donna related valuable information concerning the drug business" (p. 23). It argued, in fact, that "85% of the conversations recorded were relevant to the authorized investigation" (71a).

The Court of Appeals, again making no reference, as it might have, to harmless error, affirmed the convictions, and held that the Government had complied with the minimization requirements.

Petitioners then sought the aid of this Court, not only on the minimization issue but upon others, including a claim that the authorization for the extension order had been fatally defective.[24] In response, the Government argued that it had "complied with all [minimization] requirements."[25] No claim of harmless error was even whispered to this Court.

It was only after this Court vacated the judgments herein, and the case eventually returned to the District Court for a hearing on the authorization issue, that the

[24] See the petition for a writ of certiorari in No. 73-856 October Term, 1973.

[25] Government's Brief in Opposition, page 9.

Government started to claim "harmless error", as though *Chapman, supra*, had just been decided. Nonetheless, the District Court did not decide that issue, but instead ruled that there had been a proper authorization of the extension order (see 111a-136a). This ruling set the stage for *Bynum III*.

In its brief in *Bynum III*, the Government pressed its newly-imagined harmless error argument and the Court of Appeals accepted it. Thus, the wiretaps which had been so essential through investigation, trial and prior appeals were suddenly held to be superfluous.

A finding of harmless error is, we submit, a prize for which the Government never before strove and to which it is not factually entitled. In addition to the Government's argument that the wiretaps were essential in its investigation, we present evidence as to how useful it was at trial in securing the convictions of all the Petitioners. Not only did the Government introduce eight of the intercepted conversations in evidence against all Petitioners at their trial, but, on summation:

1. Actually replayed four of those taped conversations to the jury (A2663, 2664, 2667, 2668);[26] and

2. Referred to one conversation between Bynum and Cordovano as a description of the state of the drug market in New York City (A2660); and

3. Referred to other conversations as corroboration of Stewart's testimony (A2661); and

4. Argued, after playing the tapes to the jury, that: "when you hear Mr. Cordovano's voice and you hear Bynum's voice, that's not Stewart's testimony. It's their voices, and if you can figure out

[26] The conversations were between Bynum and Cordovano.

another explanation for what's going on there, then you should acquit these defendants" (A2671).[27]

Finally, in its charge, the trial court directed the jury's attention to the Government's claim that Stewart's testimony had been corroborated by the taps (A 2715).

When one considers the use to which the wiretaps were put at trial and during the investigation which preceded the trial, a claim that the error involved in the issuance of the wiretap order was harmless is nothing more than a smoke screen to hide that error and to save the conviction.

V. The Court of Appeals Has Held That Petitioners Bynum, Cordovano and Garnett Have Standing to Contest the Legality of All of the Wiretaps. The Court Erroneously Held that the Remaining Petitioners Lacked Standing.

In *Bynum I*, the Court of Appeals held that Petitioners Bynum and Garnett were "aggrieved persons" within the meaning of 18 U.S.C. § 2510(11) and thus had standing to contest the legality of the wiretap; it remanded for a hearing as to all Petitioners, however, since it believed that a reversal as to Bynum "might well render the convictions of the lesser figures in the scheme vulnerable and entitle them all to new trials" (7a-8a). In *Bynum II*, where, as here, all Petitioners raised the wiretap issue, no reference was made to the standing issue. In *Bynum III*, however, after holding that the extension tap was illegal, the court held that only Bynum, Cordovano and Garnett could raise the issue—the others had

[27] At the hearing, held pursuant to the order in *Bynum I*, the same Government counsel conceded that certain calls had "in fact corroborated the testimony of the Government's principal witness, George Stewart" (H112).

neither participated in the "extension" calls *introduced into evidence* nor did they have an interest in the premises where the tap was located. Thus, held the court, they were not "aggrieved persons" and had no standing to challenge the wiretap.

This petition presents to this Court, for the first time, important questions concerning the issue of standing to contest the legality of eavesdropping under 18 U.S.C. § 2510 *et seq.*

The standing test is set forth in 18 U.S.C. § 2510(11), which defines "aggrieved person" as "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." This definition has two parts, and the Court of Appeals implicitly dealt with each. In so doing, it so narrowly confined each as to fly in the face of the words themselves and to deny standing to those clearly entitled to it.

(a) "A person who was a party to any intercepted . . . communication"

The court below denied standing to all but three of the Petitioners herein partly on the ground that none of those it excluded had participated in any of the four "extension" conversations *which the Government introduced into evidence* at trial (139a). We submit that in doing so it clearly erred in a way which would permit the Government, in its sole discretion, to determine who has standing, and would deny standing to numerous persons entitled to it.

The statute gives standing to any person who was a party to *"any intercepted . . . communication."* Here, numerous of the Petitioners to whom the Court of Appeals denied standing had in fact been a party to communica-

tions intercepted by virtue of the extension order.[28] On the reasoning of the court below, these parties to intercepted conversations are to be denied the standing clearly given to them by the statute merely because the Government chose not to offer their intercepted conversations into evidence at trial. By that same reasoning, the Government could illegally tap a number of people, use the fruits of that tap in building a case which could not otherwise have been built and then avoid condemnation of their conduct by introducing against those whose privacy had been thus violated only the fruits of the taps (e.g., surveillances) rather than the intercepted conversations themselves.[29] The very words used by Congress in defining "aggrieved person" shows that no such result was intended. But that is the effect of the ruling of the court below.

(b) "A person against whom the interception was directed"

The meaning of the second branch of the definition of "aggrieved person" is also involved in this petition. It clearly includes persons who were not parties to any intercepted communication, but this Court has yet to determine, in a factual setting such as this, the status of the persons included within its terms.

---

[28] A list of the parties to each call on both wiretaps will be found at H1332-1466. That list, prepared by the Government, shows at the very least that the following petitioners were parties to conversations picked up by the "extension" tap: Small (e.g., Calls W1620, W1776, W2012, W2136 and W2471); Wright (e.g., Calls W1621, W2009, W2077, W2278, W2279, W2417, W2465, W2478 and W2479); Dyson (e.g., Calls W1628, W1665, W1787, W2166, W2177, W2178, W2434, W2510 and W2547); Nedd (e.g., Call W2220); and Birnbaum (e.g., Calls W2597, W2600, W2601 and W2602).

[29] As we point out *supra*, with regard to the harmless error issue, that is precisely what happened here, since Petitioners were denied a hearing as to how the Government may have used against them the fruits of the intercepted conversations which were not actually offered into evidence.

Here, the original wiretap application and the application for the extension order alleged that Bynum was involved in a conspiracy with persons "as yet unknown" (A59, 83), and one of the purposes of the requested interception was to ascertain the identity of those "as yet unknown" persons (A62, 87). The Government is already on record to the effect that the wiretaps were "indispensible in identifying additional members of the conspiracy."[30] Those Petitioners who were denied standing by the Court of Appeals are clearly those whose identities were discovered by the wiretaps. And we do not have a case here where their discovery was accidental—it was one of the very purposes of the tap. Though nameless at the time, we submit that they were clearly persons at whom the interception was directed. In any event, since the issue will no doubt recur, this Court should resolve the issue of whether persons similarly situated have standing to contest the legality of the wiretap without which they could not have been charged.

In short, we submit that no constitutional provision, however noble, is worth much to a person who is forbidden to resort to it. The parsimonious interpretation of "aggrieved person" espoused by the Court of Appeals flies in the face of Congressional intent and denies important constitutional protections to those entitled to them. Moreover, it allows the Government's trial strategy, rather than the facts, to determine who has standing to challenge illegal conduct. It should be reviewed and interred by this Court.

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[30] See the statement to this effect in the Government's Brief in Opposition to our first petition for a writ of certiorari (No. 73-856, October Term, 1973), at page 7, n. 4.

CONCLUSION

For all of the above noted reasons, the Petition for a Writ of Certiorari should be granted; the judgments of conviction should be reserved, and a new trial should be granted.

Respectfully submitted,

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Supreme Court, U. S.
FILED
MAY 16 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1445

ELVIN LEE BYNUM, JOSEPH CORDOVANO, ABRAHAM WRIGHT, LANCE SMALL, NEWBRY MITCHELL, FANNIE MAE GARNETT, JACQUELINE FULLER DYSON, JOHN CONIGLIO, ANGELO MELI, VINCENT ALTAMURA, IRVING BIRNBAUM, CHARLES TUZZOLINO, and LEVIS NEDD,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITIONERS' APPENDIX

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APPENDIX A

First Opinion of the Court of Appeals

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 376, 397, 398, 399, 400, 401—September Term, 1972.

(Argued November 17, 1972 Decided March 14, 1973.)

Docket Nos. 72-1857, 72-1884, 72-2101, 72-1763, 72-2142 and 72-2143

UNITED STATES OF AMERICA,

Appellee,

—against—

ELVIN LEE BYNUM, JOSEPH CORDOVANO, ABRAHAM WRIGHT, LANCE SMALL, NEWBRY MITCHELL, FANNIE MAE GARNETT, JACQUELINE FULLER DYSON, JOHN CONIGLIO, ANGELO MELE, VINCENT ALTAMURA, IRVING BIRNBAUM, JOHN FEROLDI, CHARLES TUZZOLINO and LEVIS NEDD,

Appellants.

Before:

SMITH, KAUFMAN and MULLIGAN,

Circuit Judges.

Appeal from judgments of conviction entered after a jury trial in the United States District Court for the Southern District of New York, Milton Pollack, *Judge,* con-

victing all appellants of conspiracy to violate 21 U.S.C. §§ 173 and 174 (repealed 1970) and 26 U.S.C. §§ 4705(a) and 7237(b) (repealed 1970), and convicting appellant Nedd of carrying a firearm during the course of that conspiracy. 18 U.S.C. § 924.

Remanded for an evidentiary hearing.

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FREDERICK T. STANT, Norfolk, Va., *for Appellants, Fannie Mae Garnett, Jacqueline Fuller Dyson, John Feroldi and Levis Nedd.*

THEODORE ROSENBERG, Brooklyn, N.Y. (Frank A. Lopez, Brooklyn, N.Y., of Counsel) *for Appellant, Vincent Altamura.*

H. ELLIOT WALES, New York, N.Y. (Michael P. DiRenzon, New York, N.Y., on the brief) *for Appellants, John Coniglio and Charles Tuzzolino.*

JEROME LEWIS, New York, N.Y., *for Appellant, Angelo Mele.*

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MULLIGAN, *Circuit Judge*:

These are appeals by Elvin Lee Bynum, Joseph Cordovano, Abraham Wright, Lance Small, Newbry Mitchell, Irving Birnbaum, Vincent Altamura, Angelo Mele, John Coniglio, Charles Tuzzolino, John Feroldi, Levis Nedd, Fannie Mae Garnett and Jacqueline Fuller Dyson from judgments of conviction entered on June 27, 28 and July 7, 1972, in the United States District Court for the Southern District of New York, after a trial before Hon. Milton Pollack, United States District Court Judge, and a jury.

The Indictment (71 Cr. 1169) containing three counts was filed on October 13, 1971. All of the appellants were charged with conspiring to obtain and sell narcotics in violation of Title 21, United States Code, §§ 173 and 174 (repealed 1970) and Title 26, United States Code, §§ 4705 (a) and 7237(b) (repealed 1970). All of the defendants were found guilty.[1] Counts Two and Three separately

---

[1] On June 27, 1972, Judge Pollack sentenced Bynum to a thirty year term of imprisonment and Cordovano to a sixteen year term of imprisonment. Each was fined $20,000.

On June 28, 1972, Judge Pollack pronounced the following sentences: Mele, to a twenty year term of imprisonment and a

[Footnote continued on following page]

charged Levis Nedd and Michael Lebbers (Malachy Libbers) with unlawfully carrying a firearm in the commission of the felony charged in Count One, in violation of 18 U.S.C. § 924. Appellant Nedd was found guilty under Count Two.[2]

In view of the disposition we make here, we need not recite in detail the facts in this drug conspiracy, nor need we discuss the numerous points raised on appeal. Suffice it to say that in addition to the usual sordid operation of purchasing, cutting and packaging large quantities of cocaine and heroin, the conspiracy charged here included criminal assault, planned robberies for the purpose of procuring drugs and the planning of the murder of a suspected informant to insure the continuance of the conspiracy. The Government's case was in the main provided by an informant Stewart, who while acting as a trusted key member of the conspiracy, was simultaneously supplying the Government with detailed information about the crim-

---

$5,000 fine; Coniglio, to a twelve year term of imprisonment and a $5,000 fine; Feroldi, to a ten year term of imprisonment; Wright, Small, Tuzzolino and Mitchell to seven year terms of imprisonment; Garnett to a six year term of imprisonment; and Altamura, Dyson and Birnbaum to five year terms of imprisonment.

On July 7, 1972, Judge Pollack sentenced Nedd to concurrent terms of imprisonment of fifteen years on Count One and five years on Count Two. Finding that defendants Bynum, Cordovano, Mele, Feroldi and Coniglio each presented a danger to the community, Judge Pollack denied bail and each is now imprisoned. The remaining defendants are enlarged on bail.

[2] Libbers and another defendant, Stanley Sherman, had their motions to dismiss granted. Lillian Bynum, another defendant, had her trial severed on the motion of the Government. Defendant Charles Moody testified for the Government and later pleaded guilty to an Information charging him with participation in the conspiracy in question. Robert Wallock, George Stewart, Robert Nesbitt, Edna Collins and Morty Molin were named as co-conspirators but not as defendants.

inal activities of his associates. Despite the wealth of information provided by Stewart, which in several instances was corroborated by physical surveillance, the Government also introduced into evidence written transcripts and played recorded telephone conversations of defendants Bynum and Cordovano for the purpose of further supporting Stewart's testimony. For the reasons discussed below, the admission of the evidence has, in our view, raised serious questions of statutory construction and, possibly, of constitutional interpretation, which we are loathe to decide on the basis of the sparse record before us.

The defendant Bynum the principal figure in the conspiracy, used as his headquarters, a residence on Linden Boulevard in Brooklyn which was occupied by his paramour, the defendant Garnett. On the basis of information from independent informants and the personal knowledge of agents who had worked with Bynum when he was acting as a Government informant, an application was made pursuant to the wiretap authorization provision of 18 U.S.C. § 2516 to tap the telephone of Garnett at her residence which was believed to be the focal point of Bynum's drug dealing operation. Other means of investigation were deemed to be inadequate. Cf. 18 U.S.C. § 2518(1)(c) & (3)(c).

On January 29, 1971, Judge Anthony Travia, United States District Court, Eastern District of New York, entered an order authorizing the Government to intercept and record telephone communications to and from the Garnett telephone at Linden Boulevard. On January 28, 1971, a second telephone was installed at the Linden Boulevard address. The Government learned of this second telephone through the interception of messages on the first telephone. Judge Travia entered an order on February 12, 1971 authorizing the interception and recordation of

messages on the second telephone at Linden Boulevard. Finally on February 18, 1971, an order was entered authorizing the continuance of the first telephone intercept for 14 days so that both taps terminated on March 3, 1971.

The major concern we have in this appeal is whether or not the electronic surveillance of the two telephones in question was conducted in such a fashion as to minimize the interception of communications not otherwise subject to interception. The statute, § 2518(5),[3] requires that an order authorizing such interception contain such a provision. The extension order of February 18, 1971 failed to contain the limitation; however, since it is a continuation or extension of the initial order, we consider that it incorporates by reference the minimization language of the first order. Appellants maintain, and a reading of the record would indicate, that every single conversation on these telephones from the time of the installation of the taps until March 3, 1971 was intercepted and recorded by Government agents. Appellants argue that there was no minimization effort here at all and therefore there was a violation of both the statute and the orders authorizing the taps. The Government urges in rebuttal that the appellants made no objection to the introduction of the recordings on this ground before trial, but did so only after the trial was over. At that point, counsel who had made the motion failed to appear on the return date and

[3] 18 U.S.C. § 2518(5) provides in pertinent part:

> Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

therefore the motion was dismissed. The Government's argument is inaccurate. On April 13, 1971, Mr. Hochheiser, attorney for Garnett, explicitly moved for the suppression of all the tapped conversations because of the failure of the Government to minimize the interceptions. While no motion for an evidentiary hearing was made, there was a clear argument that since every conversation no matter what its nature was recorded, there could not have been any effort to minimize. Judge Pollack made no decision on the motion at this point. The motion was renewed on trial at the conclusion of the testimony of Inspector Bitzer, Bureau of Narcotics and Dangerous Drugs, who supervised the wiretap. The motion was denied after trial and dismissed when counsel failed to appear. In view of these facts we find that the minimization issue was raised in timely fashion both before and during the trial and is properly raised on appeal. The Government further urges that neither Bynum nor Cordovano has standing to raise the minimization question. Since the phone was in Garnett's home and listed in the name of one Fred Garnett, we have no doubt that she has properly raised the issue. Moreover, Bynum was clearly an "aggrieved person" as defined in 18 U.S.C. § 2510(11)[4] and therefore is given leave to raise the question of the legitimacy of the surveillance under 18 U.S.C. § 2518(10).[5] Since Bynum was the

[4] "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

[5] 18 U.S.C. § 2518(10) provides in pertinent part:

> (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

[Footnote continued on following page]

central figure in the conspiracy, a reversal as to him might well render the convictions of the lesser figures in the scheme vulnerable and entitle them all to new trials. See *United States* v. *Weiss*, 103 F.2d 348, 352 (2d Cir.), rev'd on other grounds, 308 U.S. 321 (1939).

The issue of minimization has never been considered by this Court. Appellants rely on *United States* v. *King*, 335 F. Supp. 523 (S.D. Cal. 1971) and *United States* v. *Scott*, 331 F. Supp. 233 (D.D.C. 1971), where as in this case, all conversations were monitored and since a high percentage of irrelevant or innocent conversations were intercepted, violations of the statute were found to exist. In *United States* v. *Focarile*, 340 F. Supp. 1033 (D. Md. 1972), the court made the comment that if no attempt at all is made to minimize the interception of innocent calls, there would not only be a blatant violation of the statute but probably a violation of Fourth Amendment Constitutional rights (340 F. Supp. at 1046).

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

A different approach supporting the position of the Government although not cited by the United States, is found in *United States* v. *Cox*, 462 F.2d 1293 (8th Cir. 1972). In that case again there was 100% interception of telephone conversations with a substantial number of the calls being unrelated to the drug conspiracy charged. Chief Judge Matthes found the minimization issue to be purely statutory and not of constitutional dimension. That court found that the minimization question was to be determined on a case by case basis with the practical observation that the determination of whether or not a conversation was innocent or irrelevant often could not be made until the conversation was over and the interception terminated. The court further questioned whether suppression of *all* intercepted conversations was in any event the proper remedy for a violation of the statute in view of the civil remedy for damages against the investigating officers provided by 18 U.S.C. § 2520.[6] The court, however, emphasized that the District Court judge who authorized the wiretap order closely supervised the interceptions, requiring reports from the United States Attorney at five day intervals. The transcripts of these reports were made available to the Circuit Court on appeal.

It seems evident that we are faced here with weighty issues of first impression in this Court which may well

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[6] See, contra, *United States* v. *George*, 465 F.2d 772 (6th Cir. 1972), where there was a violation of the wiretap order authorizing surveillance only when particular individuals were using the telephone. The electronic interception was conducted without regard to the terms of the order. The court finding that the protective limitations of the order were defeated, found the wiretap evidence inadmissible and ordered a new trial which would exclude any wiretap evidence procured in violation of the order. The court found not only a violation of the statute but constitutional infirmity under *Desist* v. *United States*, 394 U.S. 244, 246 (1969).

be raised again in other trial and appellate litigation. Unlike the district court cases which have considered the minimization problem in other Circuits, we have here no breakdown or analysis of the intercepted conversations. We do know that 198 reels of tape containing more than 3000 conversations were made available to appellants before trial. What percentage of these are irrelevant or innocuous we do not know. The record only indicates that on one phone between January 30, 1971 until February 13, 1971 some 770 completed telephone calls were intercepted. Of these, 108 allegedly relate to illegal drug traffic and 21 refer to other criminal activity. This information is provided in the affidavit of an Inspector of the Bureau of Narcotics and Dangerous Drugs in support of the extension of the initial wiretap order of Judge Travia.

A reading of the testimony of the agent who supervised the surveillance would indicate that all conversations were recorded but only those presumably inculpatory were ever transcribed. The mischief lies in the interception obviously and what was not transcribed remains unknown. Although there is an allegation that the conversations were coded and guarded, which may account for the total interception, we are provided with no explanation of why some minimization was not possible to achieve. We know nothing of the nature or tenor of those calls which might be deemed innocent. The orders of Judge Travia required the United States Attorney to make reports at five day intervals indicating the progress of the investigation and the need for continuing interception. The record does not indicate whether the reports were made, and none have been made available to us. In short we do not know how closely the wiretap was supervised under the terms of the orders.

In view of the importance of the issues here involved we believe the best course to follow now is to remand to Judge Pollack for an evidentiary hearing to develop a record which will clarify the points we have discussed so that a proper determination can be made by this Court. This panel will retain jurisdiction of this matter. After findings are made below, this Court will require supplemental briefs of the parties on the minimization question, including the issue of the appropriate remedy in the event it is ultimately determined that either the minimization order issued by Judge Travia, or the minimization provision of the statute, was violated in this case. The parties will also brief the question whether such violations, if such be found, are, or are not, under the circumstances of this case, to be deemed violative of the Fourth Amendment.

Remanded.

APPENDIX B

Findings and Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Cr. 1169(MP)

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

ELVIN LEE BYNUM, et al.,

Defendants.

FINDINGS AND OPINION

POLLACK, *District Judge.*

This case is presently on appeal from the conviction by a jury of 14 defendants of conspiracy to violate the narcotic laws and the conviction of appellant Nedd of carrying a firearm during the course of that conspiracy.

The government presented evidence at the trial of seven brief conversations which were electronically intercepted by an authorized telephone tap of phones located in the headquarters of the narcotics enterprise. The defendants are contending on their appeal that the management of the wiretap violated the standards for interception of oral conversations over a telephone and that the government consequently overheard conversations unrelated to the authorized purposes of the wiretap, albeit not used on the trial.

After hearing argument, the Court of Appeals remanded the case to the District Court for an evidentiary hearing

and findings on the issue whether the electronic surveillance was conducted so as to minimize interception of communications not subject to interception under the statute.[1] Meanwhile, jurisdiction of the matter was retained by the appellate panel.

The required hearings on the inquiry by the Court of Appeals have been duly held in the District Court. The Judge who authorized and supervised the wiretaps (Hon. Anthony J. Travia), the Assistant United States Attorney in charge (Charles B. Updike), a monitoring agent and a narcotics agent who had analyzed the tapped data, as an aid to the Court, were examined and cross-examined. (One of the inspectors in charge, Bitzer, had already been examined and cross-examined on the wiretap at the trial.) The documentary evidence adduced included the wiretap orders, the regular reports to the supervising Judge from the United States Attorney in compliance with the orders, and the logs kept by the monitoring agents.[2] The reports to Washington as required by statute as well as the inventory and sealing orders and a copy of guidelines issued by the Department of Justice to its attorneys were also introduced. The parties also presented data which really amounted to briefs, i.e., such items as the defense analysis of the taps, statistics compiled by the defense, summaries by the defense of selected calls; and contentions of the prosecution, and the analyses made by the prosecution of the evidence.

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[1] Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.* (hereinafter the "Act" or "statute").

[2] The transcripts of the respective conversations of the defendants which were overheard had been furnished to them by the government before the trial; no other transcriptions were made by the government. Only a few out of all the defendants were overheard. Transcripts of the remaining calls were not provided to the Court with the exception that defendants furnished, with their post-hearing brief, transcripts of selected calls recorded said to involve attorneys and allegedly privileged.

One fact stands out from the paper weight of all of the foregoing and that is, that the supervising Judge, the government attorney in charge and the agents showed a proper awareness of, sensitivity to and reasonable regard for the right of privacy. They did what under the circumstances was reasonable and understandable in the investigation of this far flung and widely ranging narcotics conspiracy case to ferret out and identify the violators and their part in the crime and the involvement with them of corrupt law enforcement officers. The statutory mandates for the authorization and conduct of wiretaps were legally observed. There was compliance in fact under the circumstances of this case with the statute and the directives from the Judge included in his written orders and verbal instructions to minimize to the extent reasonable the overhearing of unrelated and privileged matter.[3]

[3] It should be noted that none of the calls introduced into evidence on the trial of this case were either improperly intercepted or privileged communications. The taps introduced in evidence were calls numbered Q335 (recorded 2/20/71); W1880 (2/22); W2312 (2/28); Q664 (2/28); W2463 (3/1); W2485 (3/1); Q761 (3/1). Moreover, no criticism can validly be levelled at any of the intercepted conversations which were transcribed by the government—the inculpatory nature of these with picayune exceptions is patent. The challenge here is that a number of other calls intercepted were unrelated to the investigation and consequently were overheard in violation of the statutory requirement of minimization. Apart from the possibility of criminal and civil liabilities provided in the Act for listening to unrelated matter, 18 U.S.C. §§ 2511, 2520, it has been held that suppression of improperly seized calls is the relief to be afforded for excessive surveillance. *United States* v. *Cox,* 462 F.2d 1293 (8th Cir. 1972); *United States* v. *LaGorga,* 336 F. Supp. 190 (W.D. Pa. 1971); *but cf. United States* v. *Scott,* 331 F. Supp. 233 (D.C.D.C. 1971). That was accomplished herein without a formal suppression order through the omission of the government to make any use thereof.

I.

A review of the validity of an electronic surveillance must include a determination of the perspective with which the investigating agents proceeded. The legitimacy of a search and seizure is neither established nor negated by a post-investigation analysis of what was produced by the search and seizure. *Ker* v. *California,* 374 U.S. 23 (1963). The focus, rather is on the reasonableness of the procedures employed by the investigators, *supra.* Essential to a constitutionally permissible intrusion into an individual's protected privacy is the presence of facts and circumstances which provide the investigators with probable cause to believe that individual is implicated in a criminal enterprise. Probable cause must exist as of the time of the intrusion, and the results of the investigation—which naturally informs the hindsight analysis of judges and lawyers—are not to be considered. With wiretaps, however, the degree of probable cause existing during the course of an investigation may fluctuate, since the growing amalgam of information received during the tap more sharply defines the skeletal data, inferences and sophisticated suspicions with which the investigation began.

Sometime in January 1971, Inspector Thomas P. Taylor of the Bureau of Narcotics and Dangerous Drugs (BNDD) came to Assistant United States Attorney Charles B. Updike who was then in charge of the Narcotic Unit in the office of the United States Attorney for the Southern District, with information suggesting that Elvin Lee Bynum was successfully operating a far flung narcotics trade, buying from and selling to numerous unknown co-conspirators, with the affirmative aid, counsel and protection of local and federal law enforcement officers, agents and their supervisors. Bynum's corruption of law enforcement officers as part of his narcotics empire had apparently reached such

proportions that BNDD's internal investigations unit, the Office of Inspection, was galvanized to undertake a broad scale inquiry, involving interviews with numerous witnesses and examination of extensive documentary materials.

Moreover, prior investigations had obtained a taped record tending to implicate certain attorneys as potential co-conspirators in Bynum's venture, and tending to show that they were serving to advise Bynum, and those associated with him, how the conspiracy might best be conducted to serve their joint ends.[4]

Bynum's illicit activities reportedly centered in Brooklyn, New York and ranged outward to Boston, Baltimore, Washington, areas of Virginia and Atlanta.

The criminality believed to be included as adjuncts to the acquisition and distribution of narcotics, allegedly involved numerous murders, robberies ("takeoff" of other drug dealers), thefts, possession of stolen property, the use of lethal weapons, bribery and the obstruction of justice.

Bynum's past record included a federal narcotics offense. He was well schooled in narcotic law enforcement techniques including the use of electronic eavesdropping equipment. Latterly he had served as a government narcotics informer through which he had cultivated the acquaintance of narcotics agents, local law enforcement officials, telephone company employees and others. Conversely, the agents

[4] The transcripts of such a tape recording involving certain attorneys and certain of the co-conspirators in this case was made a public record in a trial before Chief Judge Edelstein. The conviction in that case was affirmed from the bench, *U. S.* v. *Wollack*, — F.2d — (2d Cir. 1/5/72) (*without opinion*), *cert. denied*, 41 U.S.L.W. 3502 (Mar. 9, 1973).

were aware of Bynum and how he operated. He was sophisticated in the field and presented a uniquely difficult and subtle law enforcement problem.

The BNDD requested the procurement of authority to "bug" Bynum's Linden Boulevard, Brooklyn premises together with a simultaneous wiretap installation on what was believed to be the only telephone located there. The tandem eavesdropping was to be able to decode otherwise largely indecipherable telephone conversations far sooner and more effectively than was possible by the clumsy and slower traditional methods of analyzing superficially innocent and coded conversation conducted in an argot and of dissecting these with surveillance and follow-up investigations.

Following these discussions with BNDD inspectors, Updike began to formulate a program for oral and wire surveillance and to plan for obtaining authorization for electronic interception.

Updike's decisions concerning the manner in which the surveillance, if authorized, should be executed were reasonably postulated on his perception of the following additional assumptions:

The premises at 855 Linden Boulevard, where the phones subsequently tapped were located, had been identified by government agents as the nerve center of a massive criminal operation. All contemporaneous indications were that nearly everyone who came and went to those premises was criminally involved in the illicit activities. In furtherance of the operation of the enterprise, its members predictably would endeavor to use a telephone for business (communication). While Mae Garnett was known to live in the premises with Bynum's infant son, her use of the telephone

was not thought to deviate to any practical extent from the policy of restricting social usage of the telephone.

Updike reasonably predicted certain problems, prospects, and requirements inherent in electronic surveillance and in equipment used therefor. Such postulates affected the plans he devised for the interceptions. The listening post needed to be located near the target premises due to range limitations of the radios available for communication with visual surveillance teams in the field. Use of pen register devices required time to decode the symbols for the number called, and this would impede the listening endeavor whenever simultaneously attempted.

In monitoring telephone communications the foreseeable problems included at the beginning of any call, speaker or voice identification and simple word identification arising out of dialectical habits; these would require an initial listening of a few minutes to achieve necessary orientation. It was believed that all telephone conversations overheard through the "tap", would be, no matter how illicit the actual message conveyed, innocent superficially. Many illicit telephone communications could be decoded if followed by discussions of the true contents of such calls which would be electronically intercepted. The remainder would prove either decipherable by the agents, with or without informant consultation, or simply forever undecipherable. The character of calls as innocent or as illicit would be similarly determined as best as possible.

In planning for the conduct of the upcoming electronic surveillance, Updike carefully considered, among other things, the statutory minimization provision, 18 U.S.C. § 2518(5). In evaluating the effect of this provision, in addition to talking with his colleagues in the United States Attorney's office, he studied the handbook issued in 1969

by the Department of Justice on their notions at that time for the conduct of electronic surveillance. To the extent that this publication contained instructions, it could be expected that government attorneys would be guided thereby. However, these guidelines were not in any sense "regulations", as the defendants presently assert,[5] and clearly their directives would have to give way to the instructions and order of the supervising Judge.

Aside from quoting the statutory language, the guidelines on minimization contained in the handbook consist of no more than a discussion of the applicability to public telephones of the minimization requirement. This allusion undoubtedly stemmed from the circumstance that one case which brought on the statute, *Katz* v. *United States*, 389 U.S. 347 (1967), involved a telephone booth surveillance. That situation is patently distinct from the situation presented herein. The discussion in the guideline reads:

> If interception of the subject's telephone calls from a public booth is authorized, the device must be turned off when the subject is not using the booth. Violation of this section [18 U.S.C. § 2518(5)] will subject the agents conducting the interception to civil suit by the parties whose conversations were intercepted when the subject was not present (§ 2520). (Manual for conduct of electronic surveillance under Title III of Public Law 90-351, § 10.4, p. 47 (Dept. of Justice, Washington, D.C. 1969)).

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[5] On the hearng, Mr. Wall acknowledged that the guidelines were not "regulations" of the Department.

The copy of the 1969 guidelines made part of the record herein reveals no amendments reflecting development in the case law; if the guidelines were to have the operative significance suggested by defendants, such changes and other updating might be expected.

Updike concluded even before the orders so stated, that the statutory requirements, including minimization, were applicable to the proposed surveillance and that a reasonable and practical compliance plan was necessary.

Accordingly, Updike adopted the following plan as adequately safeguarding all rights of the persons involved as best as possible in the context of the investigation necessarily defined by the scope of the criminal enterprise: (1) No listening to or recording of privileged communications would be allowable, even though authorized under the Act and the contemplated warrants (See 18 U.S.C. § 2517(4)), and any such calls were to be brought to Updike's attention on a forthwith basis; (2) officers would record all interceptions; (3) the monitoring agents would be free to use their best judgment in deciding if a given call need not be listened to, except on a spot monitoring basis to see that the party and topics remained unchanged; (4) the officers would make a record or log of all conversations and transcribe only those having a high probability of being drug-related; (5) the logs and transcripts so made would be (a) delivered to Updike for his use in determining if there developed any pattern of innocent calls, objectively identifiable as such, and (b) used by the investigating team to isolate, by decoding and otherwise, the evidentiary value of the surveillances; (6) access to the logs, transcripts and the tape recordings would be rigidly controlled on a need-to-know basis so as to minimize the possibility of untoward usage, i.e., "virtually no publication of them of any kind", and (7) comprehensive, full and complete periodic reports would be made to the Court throughout the execution of the warrant to insure the continued actual control of a neutral magistrate.

After consultation with the United States Attorney, Updike gathered the relevant data and sought the required approval from the Attorney General. 18 U.S.C. § 2516.

Upon receipt of the Attorney General's approval, Updike presented the government's application to Circuit Judge Leonard P. Moore. Judge Moore indicated that he would sign the warrants; however, during a discussion of the extent of judicial control necessary to the execution of the warrant, he concluded that his being away part of the contemplated period would impair satisfactory supervision. Thus, he suggested that the Honorable Anthony J. Travia, United States Judge for the Eastern District of New York, where the target house was located, might be preferable for the assignment. Finding that Judge Travia would be available throughout the period, the application was referred to him.

On January 29, 1971, Updike and Inspectors Taylor and Bitzer met with Judge Travia to submit the application. Judge Travia testified at the hearing that he was thoroughly briefed concerning the background of the investigation, the planned surveillance, its purpose and its projected problems. His decision to authorize a wire and an oral interception was based not just on the papers submitted to him, but more fundamentally resulted from his close questioning of the government representatives who came before him. The discussion included a consideration of the likelihood that certain attorneys would probably be surveilled, and Judge Travia made particular efforts to satisfy himself that privileged communications likely would not be intercepted; the suspected role of attorneys in the Bynum operation and the character of anticipated conversations were carefully reviewed. The earlier tape recording mentioned above confirmed the probabililty that lawyers were co-conspirators in "that there was no instance in which they were giving what could properly be deemed legal advice" to Bynum.

The orders issued by Judge Travia responded to the breadth of the conspiracy under investigation, but were designed to limit the invasion of privacy which necessarily would result from the surveillance authorizations. While making an express provision in the order requiring minimization, he also insisted on the need to minimize the interception of unrelated calls in his supplemental oral instructions; he ordered the agents to use their best judgment and discretion in the endeavor to fulfill the minimization requirement. This grant of discretion subject to his supervision reflected Judge Travia's recognition of the scope of the criminal enterprise involved herein, of the use made of the premises surveilled, and of the experience and reliability of the personnel assigned to this surveillance. Judge Travia specifically concluded that this investigation did not involve an ordinary situation, but rather represented a broad attack on an exceptionally extensive criminal operation.

I find that the oral directives of the Judge and the oral communications to the Judge were appropriate and occurred as recounted in the testimony of the witnesses. Their testimony was credible and corroborated by other testimony, documents, inferences and circumstances. There was nothing incomplete or misleading that was conveyed to the Judge by the inspectors or the Assistant United States Attorney. Such reports are not trust indentures, securities registrations or testaments where repleteness is required and expected; sufficiency and prolix detail are not to be equated as standards for satisfying wiretap obligations.

The January 29 order, which was implemented on January 30 with the installation of the first wiretap herein, authorized oral surveillance of the premises by an electronic listening device ("bug") and the interception of

telephone calls made and received over phone 212-342-6203 (hereinafter "phone one"), located at 855 Linden Boulevard in Brooklyn, for a period of 20 days. By order dated February 18, 1971, Judge Travia extended this authorization for wire interception for a further period of fourteen days. The wiretap on this phone was shut down for a period of some 17 hours on February 17-18, between the expiration of the original authorization and the effective implementation of the extension order.

Before the first tap was installed, Bynum learned of the planned surveillance, and he had another telephone installed inside the premises. When the tap on phone one commenced, the agents overheard many calls being referred to a different number. This impeded achievement of the objective of the surveillance and led the government to apply for authorization for a second tap. Judge Travia entered a third order dated February 12, 1971, which authorized the interception of phone conversations over line 212-346-5992 (hereinafter "phone two"), located at the same premises, for 20 days; this order replaced the authorization for the oral surveillance.[8]

The tap on phone two commenced February 13, 1971. The authorization to intercept wire communications on each phone expired March 3, 1971, on which date the taps were ended. The interception on phone one lasted 34 days, and on phone two 20 days.

Each order made by Judge Travia authorized the interception of calls which would reveal the details of the

[8] While the government believed electronic surveillance of the premises would facilitate this investigation and Judge Travia determined probable cause existed to authorize a bug, the agents found it impossible to "plant the bug"; the risks to the safety of personnel led to a decision to forego this aspect of the investigation.

scheme which had been and was being used by Elvin Lee Bynum and others then unknown, to receive, conceal, buy, and sell illegal narcotic drugs, and to engage in the bribery of public officials, and which would reveal the identity of his confederates, their places of operation, and the nature of the conspiracy involved therein.

The terms of these orders, and the circumstances underlying their issuance, appear on this record to be, in all respects, proper and in conformity with 18 U.S.C. §§ 2516 and 2518.

II.

Before considering the operation of the wiretap and the results it achieved in order to find the facts relevant thereto, it is necessary to view the minimization requirement in its proper perspective.

An order issued pursuant to 18 U.S.C. §§ 2516 and 2518 authorizing the interception of telephonic communications does not warrant an indiscriminate monitoring of each and every call transmitted over the line under wire surveillance. *United States* v. *King,* 335 F. Supp. 523 (S.D. Cal. 1971), *rev'd* — F.2d —, Docket No. 72-1593 (9th Cir. 1973) (*on other grounds*); *United States* v. *Scott,* 331 F. Supp. 233 (D.C.D.C. 1971); cf., *Berger* v. *New York,* 388 U.S 41 (1967). The Act specifically provides that:

> Every order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to *minimize the interception* of communications not otherwise subject to interception under this chapter. § 2518(5). (Emphasis supplied).

"Intercept" is a term defined by the Act as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device" § 2510(4). This definition clearly equates "interception" with the listening to, monitoring, or hearing of described communications, either at the time such communications occur or at a subsequent time through the use of electronic means, such as a playback tape recorder. Recording a communication which has not been heard by government agents and storing that recording so that it will not be heard, unless demanded by the parties involved in the conversation, does not constitute an interception under the terms of the Act.[7] Section 2518(8)(a) confirms this distinction between intercepting and recording a communication, stating:

> The contents of any wire or oral communication *intercepted* by any means authorized by this chapter shall, if possible, be *recorded* on tape or wire or other comparable device. (Emphasis supplied).

In fact, this section encourages the recording of calls—with specific procedures for sealing and storing the tapes produced—for the protection of the individuals whose conversations are subject to interception and recording and for guarding against editing and later claims of distortion of segments of the tap.

Accordingly, the minimization requirement of § 2518(5) must be read as requiring the authorization to intercept to be conducted in such a way as to minimize the *monitor-*

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[7] Apropos *recording* of conversations, *Cf. Berger* v. *New York,* 388 U.S. 41, 988 (1967) (Harlan, *J.*, dissenting: "[I]n my view, conversations are not 'seized' . . . by their *recording* so that they may later be heard at the eavesdropper's convenience."); 388 U.S. at 108, n.1 (White, *J.*, dissenting: "*Recording* an innocent conversation is no more a 'seizure' than occurs when the policeman personally overhears conversation while conducting a search with a warrant.") (Emphasis supplied).

ing or the hearing of communications not subject to interception under the Act.[8] The "evil" to be limited by this requirement is the listening to innocent calls.

The Act does not mandate means to be used in each case to achieve minimization, nor should it be read to set absolute standards for every search. The Court, guided by existing case law,[9] must determine from the structure and purposes of the Act, the scope of this statutory requirement for the particular case at hand.

Minimization does not insure that no protected communication will be intercepted. The statute is not necessarily violated when some unrelated or innocent calls are intercepted. In enacting this provision, Congress clearly anticipated that a number of such calls would be overheard. *United States* v. *La Gorga,* 336 F. Supp. 190, 196 (W.D.

[8] Such calls not covered by the Act are referred to herein as innocent or unrelated calls. For a particular case, the order authorizing the interception provides the boundaries for relevant calls; the scope of the order accordingly is a factor to be considered in ruling on minimization.

[9] The requirement of minimization has been considered by the following Courts: *United States* v. *Fino,* — F.2d — Docket No. 72-2017 (2d Cir. May 1, 1973); *United States* v. *Tortorello,* — F.2d —, Docket No. 72-1957 (2d Cir. Apr. 5, 1973), *aff'g* 342 F. Supp. 1029 (S.D.N.Y. 1972) (Pollack, *J.*); *United States* v. *Cox,* 462 F.2d 1293 (8th Cir. 1972); *United States* v. *Lanza,* 349 F. Supp. 929 (M.D. Fla. 1972); *United States* v. *Mainello,* 345 F. Supp. 863 (E.D.N.Y. 1972) (Travia, *J.*); *United States* v. *Focarile,* 340 F. Supp. 1033 (D. Md.), *aff'd, sub nom. United States* v. *Giordano,* 469 F.2d 522 (4th Cir. 1972); *United States* v. *LaGorga,* 336 F. Supp. 190 (W.D. Pa. 1971); *United States* v. *King,* 335 F. Supp. 523 (S.D. Cal. 1971), *rev'd,* — F.2d —, Docket No. 72-1593 (9th Cir. Feb. 28, 1973) (*on other grounds*); *United States* v. *Leta,* 332 F. Supp. 1357 (M.D. Pa. 1971); *United States* v. *Scott,* 331 F. Supp. 233 (D.C.D.C. 1971); *United States* v. *Sklaroff,* 323 F. Supp. 296 (S.D. Fla. 1971).

Pa. 1971). Nor is the statute violated if some intrusion into an individual's privacy can be observed; any interception—no matter how proper and restrained—represents an intrusion.

The minimization provision should be seen as requiring a limiting process. Law enforcement officials, under supervision of a Court, must exercise their authority to intercept communications in a manner which will reduce unnecessary monitoring of innocent calls. Procedures must be adopted and followed which will result in a conservation, as best as is possible, of the right of privacy within the context of authorized investigatory activities. *See Berger* v. *New York,* 388 U.S. 41, 53 (1967). The requirement is satisfied if the Court on review of the government's procedures concludes, in the light of all facts and circumstances of the case, that "on the whole the agents have shown a high regard for the right of privacy and have done all they *reasonably* could to avoid unnecessary intrusion." *United States* v. *Tortorello,* — F.2d —, Docket No. 72-1957 (2d Cir., Apr. 5, 1973) (Emphasis added).

This focus on reasonableness necessarily forces a case-by-case analysis. *United States* v. *Cox,* 462 F.2d 1293, 1300 (8th Cir. 1972); *United States* v. *Focarile,* 340 F. Supp. 1033, 1047 (D. Md. 1972), *aff'd sub nom. United States* v. *Giordano,* 469 F.2d 522 (4th Cir. 1972); *United States* v. *Leta,* 332 F. Supp. 1357, 1360 (M.D. Pa. 1971). A review of reasonableness primarily involves a careful appraisal of circumstances and not merely a mechanical deference to the suggestive weight of statistics. Even the fact that 100% of the calls made or received during the limited period of surveillance were intercepted, if this were established, though significant, should not be overestimated. The determination of whether minimization was achieved in a particular case requires close scrutiny of, *inter alia,* the

type of criminal enterprise being investigated; the scope of that enterprise and the number of participants, known and unknown, involved therein; the number of days for which electronic surveillance is conducted; the scope of the authorizing order; the activity on the phone(s) being monitored; the number of calls; the number of monitored calls; the location of the phone(s); the length of calls; the participants in those calls; the content of calls as reasonably perceived at the time of the tap; the experience of the agents deployed for the investigation; the various pressures on the agents executing the investigation; the procedures planned and/or followed to monitor calls; the equipment employed in the surveillance; and, most of all, the supervision of the interception by the investigating agency, the supervising attorney, and by the authorizing Court.

A vital aspect of the minimization requirement—perhaps the most vital—is the degree of supervision over the surveillance provided by an impartial judicial officer. Close scrutiny by a federal or state judge during all phases of the intercept, from the authorization through reporting and inventory, enhances the protection of individual rights within the context of an extreme, yet essential law enforcement activity. Such scrutiny is basic to the structure and the constitutionality of the Act. *United States* v. *Tortorello*, — F.2d —. Docket No. 72-1957 (2d Cir. April 5, 1973). The scope of surveillance is likely confined to reasonable bounds where the agents must systematically and continually explain their conduct to a judge, seek his approval for further interceptions, and conform their actions to his detailed interceptions. *See United States* v. *Cox*, 462 F.2d 1293 (8th Cir. 1972). Indeed, even if the judge does not provide particularized guidelines beyond the terms of his order, the need to answer to an independent official sets the tone

of the surveillance. Where the judge carefully studies the reports submitted to him, reviews all details told to him, and provides an active supervision of the interception, the rights of affected individuals are most likely to be safeguarded.

Moreover, it must be remembered that minimization is only one element of the composite group of statutory safeguards included in the Act. §§ 2516-2518.

In trying to frame a statute which would avoid the defects specified in *Berger* v. *New York*, 388 U.S. 41 (1967), where the Supreme Court struck as unconstitutional the New York wiretapping statute, Congress required, in addition to minimization, particularized procedures for obtaining authorization, for supervising the tap, and for reporting to individuals the use of a tap. *See* Senate Rep. 1097, 1968 U.S. Code & Adm. News, 2112. The whole package was aimed at limiting improper intrusions into privacy, *id.*, and all the provisions must be followed. The totality of circumstances, from which the determination of reasonableness is to be drawn, includes the degree of compliance with the package of the statutory terms as a whole as well as the problems and the objects of the investigation.

III.

The entire investigation of Bynum and his co-conspirators, including the wire surveillance authorized by Judge Travia, was directed by Inspector Taylor, who was assisted by Inspector John Bitzer. Assistant United States Attorney Updike was the supervising attorney for the wiretap, with general responsibility over the conduct of that surveillance. Taylor and Bitzer maintained close day-to-day supervision over the tap, directing the work of the monitoring agents, acting as intermediaries between these agents and

Updike and Judge Travia, and keeping custody over the tapes and line sheets. Updike, Taylor and Bitzer were all "investigative or law enforcement officers," 18 U.S.C. § 2510(7). Judge Travia, as further discussed *infra,* was supervising judge and kept an active and constant watch on the progress of the tap.

As indicated above, the government was certain that others than Bynum might also use the telephone but the government did not know any categories of persons who would have occasion to be in that house and use the phone, who would not be somehow related to the illegal activities.

Accordingly, when the surveillance commenced, Updike —through Taylor and Bitzer—directed the agents to record all calls, except privileged communications. At the outset of the tap, no other categories of excludible calls had been devised. The reason for this was stated by Updike at the hearing:

> We were concerned that there should be a full record with respect to all calls for two fundamental reasons. One was the protection of any innocent parties involved in the interception and the other was a preservation of the calls themselves so that there could be no accusation at a later time that the government had made selective recordings in the conduct of this investigation, and that was the original basis of the decision, coupled with the fact that as of that time, from what we know about the premises and use of the phone and the persons who occupied the premises, that there was no ascertainable pattern in advance of persons who would be using the telephone who, in essence, had nothing to do with this investigation . . . ¶ We felt that the rights with respect to privacy of any of the persons would be protected by the procedure of taking these recordings and sealing them and having virtually no publication of them of any kind, except insofar as they bore upon the investigation so that there were a great deal of calls which, as you know, were never transcribed.

The wiretap was actually manned by six inspectors of the BNDD. Due to the sensitive nature of this investigation, which involved not only a massive drug conspiracy but also possible internal security problems in the BNDD and in other law enforcement departments, it was decided to use only personnel of inspector rank to conduct this surveillance. Inspectors were brought in from regional offices outside of New York for this purpose.

Before starting to monitor calls, the inspectors were informed of the nature of the investigation, including the possible internal security matter and including the name Bynum, and were told to record all but privileged calls.

At the hearing, Francis J. Pryal, who was one of the BNDD inspectors manning the tap, and Updike described the procedures actually followed pursuant to Updike's instructions.

The wiretap was operated from a "listening post" established approximately three miles from Bynum's narcotics factory at 855 Linden Boulevard. The post was equipped with a two-way car radio, to enable the monitoring agents to relay information to other personnel engaged in a contemporaneous visual surveillance operation. Two telephones were installed, so that the inspectors could be in constant touch with Taylor, Bitzer and Updike. To conduct the wire surveillance, two tape recorders were deployed for each tap, and two additional recorders were provided to enable preparation of one copy of each tape. To

allow actual interception of calls, two sets of headphones were connected to each tap. Additionally, there was a pen register attached to each tap, which recorded the numbers dialed on outgoing calls; digital clocks were placed in the view of the agents. The agents worked twelve hour shifts; Pryal worked 60 hours each week. While on duty, the agent sat in front of the recording equipment, with a note pad nearby and with the headphones resting on his shoulders. The tape recorders were connected to the taps and the pen registers operated automatically. Whenever the telephone line was opened on a tap—that is, the receiver was picked up or an incoming signal was received —a tape recorder was activated and a red light went on; the machine would remain in operation until the line was closed (receiver placed in cradle or ringing stopped). When a tape was filled, the agent would switch on the second recorder for the tap, and recording continued. Except for periods when equipment malfunctioned, all calls were recorded. The machines could be turned off and were deactivated by the agent if a phone was left off the hook for a prolonged period.

When the red light went on and the recorders activated, each agent of the two man team would put his headphones in place and begin intercepting the call. During the call, he would make some notations about the call. After the call was completed, one agent would make an entry on a line sheet for this call. The time of the call and its completion, the position on the tape, and remarks about the content of the call would be entered. A mark might be entered next to the report of especially relevant calls; "N" would designate a narcotics related call, "IS" an internal security related call; transcripts were prepared for some of these calls.

Logs were maintained for every call and were prepared in duplicate. A book of cumulative original logs was maintained at the post, and a book of the copies kept at BNDD headquarters. A photocopy of the logs was prepared for Judge Travia.

When a tape was filled, and an agent had switched the system over to a second recorder, one copy of the completed tape would be made. The same team that manned the recording also produced the copy. The original of the tape was marked with the names of the agents making the tape and its copy and with the date and was sealed; the copy was similarly marked. Taylor and Bitzer had custody of these tapes, until they were delivered to and sealed by Judge Travia.

At the outset of his monitoring, Pryal found it to be difficult for him to understand all the argot used in the conversations and to recognize the participants of the calls. Even when particular calls were transcribed, it was often necessary to replay the tape several times to decipher words. The process of voice identification often required multiple calls involving a party, and occasionally some parties could not be identified. References to locations were troublesome, especially to inspectors from other geographical regions who were unfamiliar with the Brooklyn area; a wall map was hung to aid in this connection.

More basic, the inspectors detected that word codes and guarded language [10] were employed by speakers to hide the

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[10] The guarded language is reflected in the following:

Bynum: Hey'd you ever hear anymore from them people?
Stan [Sherman]: Which ones Al?
Bynum: That you were talking about.
Stan: You mean what I saw you about?
Bynum: Yeah. (Call W1889)

[Footnote continued on following page]

true meaning of conversations. It was suspected that the codes adopted related to items sold in Bynum's other business enterprises, for example, his clothing store, although other codes were sensed as well. Calls that may on their face have appeared innocent were accordingly monitored; and as the investigation proceeded, the intended meaning of earlier calls dawned on the agents.

Certain types of calls could be recognized after the monitoring progressed. Specifically, a number of calls involved one who turned out to be a teenager named Donna, who was frequently present in the house. Some of her calls were highly relevant, as she often served as a message service for co-conspirators; these calls were intercepted. However, there were a number of calls between Donna and her teenage friends, often long calls, involving unrelated subjects and containing no investigatory leads. Pryal testified that, after a time, he would drop his headphones during such calls, thereby not intercepting them. *See* 18 U.S.C. § 2810 (4). The red light and the activated tape recorder enabled him to know if a call was still in progress. Occasionally, as the call continued, he would spot check by putting the headphone over one ear to listen and to determine if the parties to the call had changed.

The monitoring agents determined while a call was in progress whether to intercept it. Aside from the non-intercepted "Donna calls," Pryal stated that he dropped his

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Cordovano: Yeah. That other fellow didn't call over, huh?
Bynum: Yeah he came past here.
Cordovano: Yeah.
Bynum: Yeah.
Cordovano: Did he give you anything?
Bynum: No. I'll tell you when I see ya.
Cordovano: Oh. All right well I'm still waiting, eh.
Bynum: All right.
Cordovano: The boy is out.
Bynum: I'll tell you. (Call Q707)

headphone at other times, citing when called on for an example a call between Mae Garnett, a co-conspirator convicted herein, and a friend of hers, which appeared to be an innocent call.

During the course of the surveillance about 10% of the conversations that took place during Pryal's shifts were not intercepted; he did listen briefly to some of each call, in order to identify the parties, to recognize the nature of the conversation, and to spot check if the parties changed but did not intercept beyond this. He could not recall if his partner stopped intercepting a call at the same time Pryal did.

Although when a copy was made of a tape, an agent could potentially listen with an earphone to a previously unmonitored innocent call, this did not occur. The agents who originally manned the recording of a tape made the copy and at this point could therefore avoid and did avoid intercepting the unrelated calls.

It was stipulated that, if called as witnesses, each of the other inspectors monitoring calls would have testified to the same effect as Pryal. The percentage of the actual conversations that were intercepted was thus approximately 90%.

During the course of surveillance, primary and continuous direction was properly provided by Inspectors Taylor and Bitzer. Updike was kept informed on all developments and remained in close touch with the inspectors. Depending on the week and on the activity at the post, Updike received five to twenty calls per week from the inspectors and made five to six calls to them. On occasion, Updike would visit the listening post, to glean a first hand impression of the conduct of the interception. Updike received and read the logs prepared by the monitoring agents, be-

fore these were routed to Judge Travia, along with the required reports which he prepared and signed. He looked at every page of the logs and examined particularly those entries which the inspectors had indicated were significant. He looked to see who was calling whom, at what numbers, how often and what was being said, what was in the conversations and what was not in the conversations and how well the tap was serving the purpose of the investigation. He became aware of the frequent users of the phones (e.g., Donna) and of the degree to which the calls of such persons would be intercepted. When further information was required, he would consult the inspectors.

The Court finds that Updike satisfactorily fulfilled the function of a supervising attorney; he designed the plan for the wiretap and determined that his plan and Judge Travia's orders were being followed.

Updike prepared and submitted written reports to Judge Travia dated February 4, 8, 16, 18, 24 and March 1 and 8, 1971, which summarized the progress of the interception. The letters, accompanied by detailed line sheets of the calls (logs), were hand delivered to Judge Travia by Updike, Taylor, and/or Bitzer on or about the respective date of the particular report. Whenever preparation of a written report was delayed, Updike reported to the Judge by phone and subsequently provided the written report. Each report analyzed an approximate four-day period,[11] stating the days covered, the times in which equipment was in-

[11] The reports covered the following periods: Feb. 4 (Jan. 30-Feb. 2); Feb. 8 (Feb. 3-Feb. 7); Feb. 16 (Feb. 8-Feb. 12); Feb. 18 (Feb. 13-16, for phone two); Feb. 24 (Feb. 12-Feb. 22, for phone one; Feb. 17-Feb. 22, for phone two); March 1 (Feb. 23-Feb. 27, for phone one and two); and, Mar. 8 (Feb. 28-Mar. 3 for phone one and two). Additionally, written information was contained in the applications for the orders of February 12 and 18.

operative, the number of calls intercepted, the number of calls apparently related to criminal activity, the number of intercepted privileged calls, and specific information learned from certain calls. The logs gave more particularized information, itemizing the time and length of each call, the parties involved, if identified, and the nature of its content. These reports more than adequately fulfilled the five day reporting requirement of Judge Travia's orders, and provided sufficient information from which the judge could determine compliance with his orders and the Act.

Equally significant to these written reports were the supplemental oral discussions and meetings between Judge Travia and the agents which explored the matters in detail and in their full perspective. Judge Travia, who was called by defendants as a witness, stated that having carefully reviewed all reports submitted to him, he asked questions to be certain he fully understood what was transpiring. In supervising the investigation, he was aware of the minimization requirement but recognized the problems inherent in this particular case. He testified that the conspirators "were so far-flung and it involved so many that it was very difficult to say that 'You can't listen to certain parties.' You have to give them [the agents] some latitude because here I am dealing with not the ordinary type of agent. . . . I was talking to agents who knew what it was all about, and in discussing this with them I wanted to make sure that they were aware of the minimization rule, and all the other things that might come up, such as the attorney-client relationship." He perceived this as an extraordinary investigation, permitting greater latitude and discretion, once he was confident that this was required and that his orders were being followed.

During the course of these closely-timed frequent discussions, the problem of calls involving attorneys was

raised. The extent of attorney-client confidentiality was considered, as was the possible involvement of certain attorneys in illicit activity. Judge Travia was very particular in reviewing whether privileged communications were being overheard.

The record conclusively establishes that Judge Travia carefully and actively supervised the surveillance authorized by his orders and that he was especially concerned about assuring compliance with the minimization rule and about protecting privileged communications, when they could be so regarded. His testimony, as well as his order extending the initial tap, make clear that he found the minimization effort reasonably satisfied in the context of this case.

Such a determination by the supervising Judge, who faced the problems of the interception contemporaneously with its execution, must be afforded great weight when called into question on a taint hearing. *Cf. United States* v. *Becker*, 334 F. Supp. 546, 549 (S.D.N.Y. 1971) (Weinfeld, *J.*), *aff'd* 461 F.2d 230 (2d Cir. 1972). The supervising Judge had the most intimate knowledge of the facts and circumstances of the surveillance. Where as here it can be found that the Judge carefully and actively supervised the surveillance, his determination that minimization was achieved "is itself a substantial factor tending to uphold the validity" of that decision. *Id.*

IV.

In analyzing the investigation conducted herein, the parties have prepared various statistical analyses relating to the content of intercepted calls. Such analyses must be received with caution. *See United States* v. *Focarile*, 340 F. Supp. 1033, 1049 (D. Md.), *aff'd sub nom. United States* v. *Giordano*, 469 F.2d 522 (4th Cir. 1972); *United States*

v. *King*, 335 F. Supp. 523, 542 (S.D. Cal. 1971), *rev'd*, — F.2d —, Docket No. 72-1593 (9th Cir. Feb. 28, 1973) (*on other grounds*). While statistical correlations may provide guidance on the question of minimization, such calculations can be misleading and, if so, should not be accepted as conclusive on that question. *Id.* Mathematical manipulations prepared for the purpose of the instant review are necessarily grounded on retrospective and self-interested analysis by lawyers or agents, who have utilized the benefits of time and hindsight. The emphasis in deciding minimization must be on the perspective of the inspectors as of the time of the surveillance. Informed second guessing of the inspectors, even bolstered by percentages, should not cloud that perspective. The inquiry should not be reduced to a game of numbers, played out in a vacuum, and sealed off from its real consequences.

From the evidence before the Court including the logs and reports made contemporaneously with the operation of the wiretap and on analysis of the computations submitted, the Court finds the following:

During the operation of the wire surveillance, which continued for 34 days on phone one and 14 days on phone two, a total of 2,604 calls were made or received on phone one, and 832 on phone two. All of these calls, 3,436, were automatically recorded. Of these 3,436 calls, 1,378 were not completed due to busy signals, wrong numbers and the like, and some 84 calls were made to information, weather and similar services. The number of completed conversations which were recorded from both phones was 2,058 (or 1,974 if the service calls are omitted) and of these only 90% were "intercepted." 18 U.S.C. § 2510(4).

Of the 2,058 completed calls, 1,557 were finished in two minutes or less; 1,277 of these—or more than half the total

of all completed calls—lasted one minute or less. A call of such brief duration ordinarily does not lend itself to minimization; such a brief call is completed before the agents can confidently even determine the nature of the call and identify the parties to it.

Only 501—or approximately 25% of the completed calls—lasted three minutes or more. Of these, approximately 71 involved Donna talking with a party not a defendant herein. Some of these were intercepted, since Donna sometimes served as a message center for the conspirators and took important messages during her handling of the telephone traffic in these premises. However, most of the calls which involved Donna and a friend were not intercepted except in the early stages of the tap before her position was identified.[12]

Approximately 79[13] of the balance of the calls lasting three minutes or more involved at least one known co-conspirator, and other calls involved persons seemingly implicated. In the context of this investigation of a large scale narcotics conspiracy which had overtones of internal security problems, self-evidently such calls should be generally intercepted in the early stages of the surveillance. At that stage many parties are unknown to the agents and a call involving a known conspirator quite possibly is with a co-conspirator previously not identified as such. As the search progresses and the names of callers are learned, interception of calls made by the known conspirators allows the agents to effect the necessary screening of persons somehow related to these known conspirators. Through listen-

[12] A surveillance report of February 4, 1971 indicates a contemporaneous suspicion that Donna was involved in the drug processing activities.

[13] This figure is derived from defendants' tables which identify participants in, and the time of, each call.

ing to calls, it can be determined whether a particular individual who had been seen by visual surveillance teams meeting with the conspirators is actually not involved with the criminal activities.[14] Realization that a call is innocent, after several calls involving the same individual are reviewed, has relevance to the investigation. Judge Travia's orders specifically made relevant, calls tending to identify the participants in the conspiracy.

If the unknown party turns out to be a co-conspirator, of course his calls are properly intercepted; calls between known co-conspirators should be monitored, for relevant information may emerge at any point in a call. A study of the logs herein reveals that the agents were making ongoing identifications of callers and of the character of their involvement.

In determining how many of the calls might have been unrelated to the investigation, one should not lose sight of the great amount of highly relevant material which was contained in the majority of the calls. Early in the surveillance, for example, the agents monitored a call between Bynum and one Vernon Thomas, perceived to be a Bynum lieutenant, concerning a prospective meeting between Thomas and "Sergeant," who was apparently a New York City policeman. Due to this call, the meeting was visually surveilled.

The agents heard a series of calls during the first week of the tap, in which Bynum spoke to parties then identified as "Yolanda," "Herman," "Brooks," Cordovano, and an unknown party which apparently related to narcotics traffick-

[14] Even where one party to the call is not a known conspirator, the content of the call might prove relevant. For example, in call W118, Mae Garnett spoke with an unidentified female. During the conversation, use of drugs and sales of drugs were discussed.

ing. They also learned of important ramifications through a series of unanswered calls made to a number later identified as that of a former federal narcotics agent. Additionally, calls involving attorneys of a seemingly incriminating nature were being received. Clearly related calls were continuous throughout the period of surveillance. In fact, the calls actually introduced into evidence at the trial were intercepted during the last 10 days of the tap.

These continuous conversations helped the agents to identify the parties actually involved in Bynum's criminal activities, to clarify their understanding of those activities, and to coordinate parallel investigatory efforts being undertaken at the time.

A retrospective analysis of the calls was prepared by the government, purporting to demonstrate the relevance of the calls to the investigation. This study concludes that 85% of the completed calls contained information useful to the investigation.[15] This figure, as a product of hindsight knowledge and review, is of course not conclusive.

The implications which defendants seek to draw from the mathematical collations proffered by them are factually unsupported and unsupportable. They are result oriented and do not portray an accurate or fair reflection of the proper perspective of the seemingly endless conversations

[15] The reports submitted to Judge Travia indicated the number of calls perceived at the time as relating to illicit activity; that number set against the total number of calls produces a somewhat lower percentage of relevant calls. However, the number of drug related or corruption related calls provide only one aspect of relevant calls. The present estimate reflects a broader concept of relevance, including calls helping to identify parties and calls allowing placement of persons at particular places during the investigation.

even if considered on a retrospective basis of a wisdom born of hindsight.[16]

The Court, after its own review of the materials submitted herein, finds that the percentage of intercepted conversations that were not relevant or which fell outside the broad scope of the authorization orders was *de minimis*.

The defendants have called special attention to the conversations which they say were with attorneys, sometimes identified, sometimes not. They label these as "privileged." The facts do not so demonstrate.

In the beginning stage of the tap, the callers who were in fact attorneys had not conclusively been identified as such. Name and voice identification usually required multiple calls. On incoming calls, the attorney often did not state his name and was not called by his name and did not announce his profession. Even after names were learned, those names at first did not connote "attorneys" to the monitoring agents. Some lead time was necessary before discriminating patterns of interception could be established.

Moreover, even if the agents had been provided with a list of attorneys derived from visual surveillance of visitors to the premises, there was no assurance that such callers would converse on privileged matter.

A call from a lawyer to a person is not automatically privileged. It is basic that the privilege only inures to a client and that discussions of illegal activities are not

[16] Defendants have submitted summaries of selected calls; the basis used for selecting the calls has not been provided, although the Court requested this information. The Court has read these summaries and finds nothing in them which contradicts the findings stated herein.

masked by testimonial privilege. *Clark* v. *United States*, 289 U.S. 1, 15 (1933); *United States* v. *Kahn*, 366 F.2d 259, 265 (2d Cir.), *cert. denied*, 385 U.S. 948 (1966).

Thus, it is not a privileged communication to be told by or to discuss with a lawyer that some third party has committed or has been picked up for murder or for violation of parole, or that he needs money (ostensibly for criminal enterprise), etc. The attorney-client privilege exists where the purpose of the communication is to obtain professional legal advice, *United States* v. *Kovel*, 296 F.2d 918, 922 (2d Cir. 1961), not news of others, gossip or criminality.

From the very first attorney call (although not so recognized at the time) through the duration of the tap, references in the calls made the content of these conversations highly relevant to the investigation and, even more, suggested that the lawyers were involved in facilitating illicit activities of some aspect of Bynum's enterprise. The calls were replete with references to co-conspirators, possible influence peddling and official corruption, and to other illegal acts.

More particularly, the alleged conversations with callers now portrayed by defendants as lawyers, reveal the following:

Call W168, made on February 1, 1971, discussed the arrest of Dickie Diamond on a charge of murder and his subsequent parole; Bynum suspiciously thought "something is fishy." Further, the caller stated: "take care of Wright. Ken just told me about that. I'll speak to him." Abraham Wright was a narcotics distributor convicted herein. This call, which is obviously relevant to an investigation of security leaks, bribery, and Bynum's colleagues, contains no privileged communication.

Joey Cordovano, another principal convicted herein, was discussed on February 1 and 7 by the alleged attorneys.

On February 10, the caller reported "a friend of Donald Jones got arrested for killing a girl—not for killing her, for acting in concert in killing her," to which Bynum later says "he's talking about Donnie." On February 13 Bynum tells the caller to "go down to the Seventy-first Precinct. Vernon Thomas." Someone, possibly Thomas, was found with pistols, and Bynum significantly adds "the sergeant's in there now." Another arrest for another murder is reported by the caller on February 13, when Donald King was arrested. The caller states "we told him to go to New Jersey till we could speak to the DA," and he tells Bynum how the murder charge should have been beaten.

The caller on February 18 reports to Bynum a list of achievements obtained on behalf of Bynum. He indicates he "got Donald Jones dismissed, the murder"; "Charles Howard's stuff dismissed"; "I got a gun charge dismissed. I got a drug charge dismissed. I got a [sic] auto larceny dismissed"; "Joyce Dickerson was dismissed". The caller further stated "I spoke, I was with the cops all day. . . . Uh, O'Neil. Justice. (.....) Butler, I forget the rest of the names. There [sic] not bad guys, you know, they, they helped out where they could, but you know, it's a bad case."

The import of this call was not lost on the agents, who transcribed it and who made this log entry:

> Attorney to Bynum (Fingers)—discussed his day's efforts to get hijackers off—from conversation—appears hijackers worked for Bynum—also named police officers who "did what they could but they had an identification."

Money, the lubricant of the narcotics trade, provided another series of suspect calls. For example, in call W186, made February 1, Bynum tells an unidentified male that he wants $30,000. On February 4, Bynum's call indicated that Wright, a conspirator herein, would bring the lawyer $2,000. On February 9, Bynum is seeking a loan of $25,000 and on February 10 he talks of "$18,000 worth of merchandise."

A considerable number of the alleged "attorney calls" involved only messages to or from Bynum for call backs; the defendants do not mention this. Such calls are not even arguably privileged; they were however relevant at the time to the agents who were tracking Bynum's whereabouts and movements.

Most of the calls from and to lawyers ended quickly—in a minute or less—creating difficult problems in screening such calls; of the conversations compiled by defendants, only 10 or 67 lasted more than three minutes. The defendants correctly say that "a privileged communication may unavoidably be intercepted due to its brevity or due to the failure of the monitoring agents to realize that the communication was privileged."

Furthermore, in the calls of longer duration, at least spot monitoring was necessary to make certain the parties to the calls did not change. In the two longest calls included in defendants' compilation and claimed as privileged, Bynum started out talking to a lawyer, but then talked with Joey (likely Cordovano). Conversations between co-conspirators were highly relevant and properly intercepted; the defendants' index does not reflect this.

A number of the calls in defendants' listing involved attorneys calling their families or associates from Bynum's

narcotics factory. Obviously, no professional privilege inuring to any of the defendants attaches to this type of call.

The Court has carefully reviewed each of the calls reproduced and indexed by defendants, and finds in these calls little that is privileged and much that is prima facie criminally suspect. Interception of these calls, against the background of this case, was an exercise of reasonable judgment and authorized.

18 U.S.C. § 2517(4), cited by defendants, provides:

> *No otherwise privileged* wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character. (Emphasis supplied).

This section only applies to conversations which are "otherwise privileged," and this Court has found the vast majority of calls compiled by defendant not to be privileged. Moreover, the statute cited deals with authorization for disclosure of calls. Aside from possible internal use, the government did not disclose any that were even arguably privileged; none was used on the trial.

V.

In sum, the Court finds that the agents conducting the instant interception, as well as the officials supervising them, made a good faith effort to achieve the requisite minimization, and "on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion." *United States* v. *Tortorello*, — F.2d —, Docket No. 72-1957 (2d Cir. April 5, 1973). The procedure by which the agents suspended interception of seemingly innocent calls represented in the given circumstances a substantial and sufficient effort to limit the interception of unrelated calls.

The number of days for which the interception continued was far smaller than that approved of in *United States* v. *Tortorello*, — F.2d —, Docket No. 72-1957 (2d Cir., April 5, 1973). The number of days authorized by Judge Travia in each of his three orders was less than the maximum period allowed by the Act; a limitation of days, like a limitation of monitoring hours, represents a cognizable minimization of the intrusion into privacy.

Most impressive on this record is the attentive and dedicated supervision provided by Judge Travia over the broad authorization he gave the agents. This distinguishes the instant case from the decision in *United States* v. *King*, 335 F. Supp. 523 (S.D. Cal. 1971), *rev'd.* —F.2d —, Docket No. 72-1593 (9th Cir., Feb. 28, 1973) (*on other grounds*). This Court finds that there was herein an ongoing and informed review of the interception as it was in progress, which represented a clear safeguard for the rights of the defendants.

Defense counsel have conjured up procedures which might have been followed at the time of the surveillance to achieve a greater percentage of minimization. Some of these suggestions are logical, and might well have been adopted by the agents *if* the agents, as counsel, had the benefit of later learned knowledge when the plans for the interception were drawn. The agents, however, were limited by the practical situation they faced and had to act accordingly.

As with a criminal trial, a defendant is not entitled to perfection in the censorship of what is available to be overheard on the tap; he is entitled to a fair effort from the government agents at not overhearing what is irrelevant to the search. This invokes a judgment quotient on the part of the surveillance agents and requires a determination whether they unfairly abused their authority to listen in.

The important law-enforcement tool provided by Congress and carefully tailored to meeting exacting constitutional standards should not be dulled by uncompromising administration to a point of practical ineffectiveness. The Court must guard, as Mr. Justice Harlan warned in *United States* v. *Blue*, against "increase to an intolerable degree interference with the public interest in having the guilty brought to book." 384 U.S. 251, 255 (1966).

I conclude that the obligation to minimize was properly ordered and complied with in this case.

The foregoing shall constitute the Court's findings and conclusions to be submitted pursuant to the remand by the Court of Appeals.

SO ORDERED.

June 6th, 1973

MILTON POLLACK
United States District Judge

APPENDIX C

Second Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1137-1142—September Term, 1972.

(On Submission to the Court July 2, 1973

Decided September 24, 1973.)

Docket Nos. 72-1857, 72-1884, 72-2101
72-1763, 72-2142, 72-2143

UNITED STATES OF AMERICA,

Appellee,

—against—

ELVIN LEE BYNUM, JOSEPH CORDOVANO, ABRAHAM WRIGHT, LANCE SMALL, NEWBRY MITCHELL, FANNIE MAE GARNETT, JACQUELINE FULLER DYSON, JOHN CONIGLIO, ANGELO MELE, VINCENT ALTAMURA, IRVING BIRNBAUM, JOHN FEROLDI, CHARLES TUZZOLINO and LEVIS NEDD,

Appellants.

Before:

KAUFMAN, *Chief Judge*,
SMITH and MULLIGAN, *Circuit Judges*.

Appeals from judgments entered after a jury trial in the United States District Court for the Southern District of

Appendix C — Second Opinion of the Court of Appeals

New York, Milton Pollack, *Judge*, convicting all appellants of conspiracy to violate 21 U.S.C. §§ 173 and 174 (repealed 1970) and 26 U.S.C. §§ 4705(a) and 7237(b) (repealed 1970), and convicting appellant Nedd of carrying a firearm during the course of that conspiracy. 18 U.S.C. § 924. The panel previously remanded the case for an evidentiary hearing to determine whether certain wiretap evidence used at trial, had been legally obtained. 475 F.2d 832 (2d Cir. 1973).

Convictions affirmed.

W. CULLEN MACDONALD, Assistant United States Attorney, New York, New York (Paul J. Curran, United States Attorney, Southern District of New York, John W. Nields, Jr., Assistant United States Attorney, of Counsel), *for Appellee.*

HENRY J. BOITEL, New York, New York, *for Appellant Bynum.*

PATRICK M. WALL, New York, New York, *for Appellants Cordovano, Wright, Small, Mitchell, Garnett, Dyson, Birnbaum, Feroldi and Nedd.*

H. ELLIOT WALES, New York, New York, *for Appellants Mele, Coniglio and Tuzzolino.*

FRANK A. LOPEZ, Brooklyn, New York, *for Appellant Altamura.*

MULLIGAN, *Circuit Judge*:

On a previous appeal to this court we remanded this case to the trial judge, Hon. Milton Pollack, United States District Judge, Southern District of New York, for a hearing to determine whether certain wiretap evidence used at trial had been legally obtained. *United States* v. *Bynum*, 475 F.2d 832 (2d Cir. 1973). After the hearing, Judge Pollack issued his findings of fact and conclusions of law, upholding the validity of the wiretaps. 360 F. Supp. 400 (S.D.N.Y. 1973). We now affirm the convictions in all respects.

I. The Facts

On October 13, 1971 an indictment was filed, charging appellants Bynum, Cordovano, Wright, Small, Mitchell, Garnett, Dyson, Coniglio, Mele, Feroldi, Altamura, Birnbaum, Tuzzolino and Nedd with conspiracy to deal unlawfully in narcotic drugs in violation of 21 U.S.C. §§ 173, 174 (repealed 1970) and 26 U.S.C. §§ 4705(a), 7237(b) (repealed 1970). All appellants were found guilty on this charge. The second count of the indictment separately charged appellant Nedd with carrying a firearm during this conspiracy in violation of 18 U.S.C. § 924. Nedd was found guilty on this charge.[1]

The primary purpose of the conspiracy, which was alleged to exist chiefly in New York City, from January 1, 1970 until April 30, 1971, was to obtain, process and distribute large amounts of narcotic drugs which had been unlawfully imported into the United States. The furtherance of the common scheme involved one unsuccessful rob-

[1] The disposition of the charges against other defendants as well as a list of those who were named as co-conspirators but not as co-defendants, are set out in our prior opinion. *United States* v. *Bynum*, 475 F.2d 832, 834 n.2 (2d Cir. 1973).

bery, together with the near fatal shooting of the victim, another aborted robbery and an elaborate plan to murder a corrupt New York City patrolman, who was thought to be cooperating with the authorities. The Government's case rested principally upon the evidence of George Stewart, a veteran and former college student, whose record was respectable until he invested in a Manhattan restaurant which eventually stripped him of his resources and indebted him to appellant Cordovano, a customer. At Cordovano's suggestion Stewart embarked on a career of selling cocaine in order to repay his debts. Cordovano and Bynum were the key figures in the drug conspiracy here revealed. Bynum was the banker for the group, supplying large sums of money for the purchase of heroin and cocaine. He and Cordovano supplied the drugs and supervised their mixing, cutting, packaging and distribution through Harlem. The distributors there were Wright, Small, Mitchell, Garnett and Dyson. The suppliers of the ring were Altamura, Mele, Coniglio, Tuzzolino, Birnbaum and Feroldi who normally operated through Cordovano.

From May 1970 on, Stewart sold heroin and cocaine for Cordovano on a consignment basis, sharing the profits. Stewart was eventually introduced to Bynum, Coniglio and Mele by Cordovano, and Stewart's role in the group became increasingly important. In September 1970, Cordovano purchased 5 kilos of heroin from Coniglio and Mele for $72,500 in cash which had been supplied by Bynum. Stewart picked up the heroin. Some of the drugs were delivered to Bynum through Cordovano and the remainder were stored in Stewart's girlfriend's apartment. At Cordovano's instruction, Stewart delivered 2 kilos on October 29th to a customer, Shaw, who paid him $38,000. Shaw in turn unwittingly resold to an undercover agent. Stewart was arrested at this sale and was found to possess ⅛ of a kilo of heroin

as well as a gun. Bynum supplied the collateral for Stewart's bail bond.[2] In December 1970, Stewart was re-arrested since a prior sale had also resulted in another resale to an undercover agent. It was at this juncture that Stewart was approached by the Government and agreed to become an informant.

On January 10, 1971, Stewart, at Cordovano's request, proceeded to Bynum's residence with a device for sealing plastic bags. Wright, who was expected to arrive with 2 kilos of heroin to be cut, appeared without the drugs since he was apprehensive of police detection. Bynum, Wright and Garnett left Stewart for another location. Later in the evening they returned to Bynum's apartment complaining of nausea resulting from the inhalation of heroin dust during the cutting operation. Cordovano subsequently brought to Bynum's apartment 5 kilos of cocaine which he stated he had purchased from Altamura. Bynum cut ½ kilo of this cocaine with an adulterant. Stewart took a sample of this and the balance was given to Wright. The 4½ kilos of uncut cocaine were stored at the apartment of Stewart's girlfriend and at Cordovano's mother's apartment. Later in January, Stewart met Cordovano, Altamura, Coniglio and Mele at a wake. It was at this point that their conversations indicated that there was a serious shortage of drugs for the local market. Altamura stated that he had a source but the promised sale eventually fell through when his seller demanded $36,000 for 2 kilos of heroin on February 19, 1971.

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[2] Bynum testified that he posted collateral for Small's, Wright's and Mitchell's bail bonds after their arrests on the present charges. Defendant Garnett pledged her house as collateral for Cordovano's bond.

At this point, desperate to obtain heroin, the core group adopted less orthodox but predictable means of assuring their continuing business. Cordovano and Bynum discussed with Stewart the possibility of robbing one Marty Carlin, a drug dealer who they believed had large quantities of heroin and cash stored in his safe. The plan was that Nedd and one Michael Libbers (an original co-defendant whose motion to dismiss was granted below) would take Carlin to an apartment selected by Stewart where Carlin would be "persuaded" to reveal his safe combination. Eventually, in March 1971, Bynum, Nedd, Cordovano and Stewart made the final plan to rob Carlin. Nedd located Carlin at a west-side hotel, but Carlin resisted and was shot by Nedd. Although he was seriously wounded, Carlin was able to identify Nedd as his assailant. When Nedd was subsequently arrested in New Jersey, he had jewelry belonging to Carlin as well as identification papers belonging to another victim of the attempted robbery.

In the meantime, other efforts were made to secure heroin. On February 25, 1971, Stewart was given $65,000 in cash at Bynum's direction to pay to Altamura for heroin to be turned over for cutting and sale to Garnett and Dyson. Altamura only had cocaine and no heroin. It was then decided to purchase 2 kilos of heroin from Birnbaum whose source was Feroldi. After giving a kilo of plaster in order to cautiously test the delivery plans, Feroldi finally delivered a kilo of heroin on March 13, 1971 to Stewart and Cordovano. Cordovano brought it to Bynum at Dyson's home for cutting. It proved to be impure in quality and somewhat less in quantity than represented.

On March 29, 1971, after meetings with Cordovano, Altamura delivered 2 kilos of heroin to Cordovano and Stewart who brought it to Bynum at Dyson's house. Bynum, Dyson, Garnett, Mitchell, Wright, Cordovano and Stewart, all participated in the cutting and packaging of the drug.

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Early in April, 1971, Cordovano and Stewart held separate meetings with Tuzzolino and with Coniglio and Mele for a 5 kilo purchase of heroin. A 2 kilo purchase of heroin was made from Tuzzolino using Feroldi's car to make delivery to Stewart who in turn delivered it to Cordovano. After a variety of furtive maneuvering, this was followed by the usual cutting and repackaging operation at Dyson's residence with Bynum, Cordovano, Stewart, Garnett, Dyson and Small participating.

Cordovano and Bynum also proceeded to plan with Moody (a prosecution witness) to steal heroin and money from two drug dealers in Washington, D.C. Feroldi was an added starter, participating in the planning in mid-April, 1971. The theft was never consummated despite a trip to Washington by Feroldi and Moody who were telephoning Cordovano for advice. They left behind them in Washington police uniforms, chloroform, tape, a sledge hammer and a trunk with a .38 caliber pistol in it. Bynum paid some of their expenses for this aborted scheme.

On April 29, 1971, the partnership business came to an abrupt termination. Bynum and Garnett advised Stewart that an informant had betrayed them. He was identified as corrupt New York City patrolman Wollack who was believed to be talking to federal authorities. Cordovano and Bynum planned that Garnett was to have Wollack visit her home on a pretext. Cordovano and Stewart were to follow him from Garnett's home to the meat market operated by Bynum and Cordovano where he was to be knocked out, searched for bugging equipment, shot to death and placed in a plastic bag. Stewart, who at this point was fully accepted as a member of the core group, even purchased surgical gloves at Bynum's suggestion that the gloves would foil any paraffin test indicating that the apprehended person had recently fired a gun. Stewart

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fortunately alerted the authorities. Cordovano and Stewart were apprehended en route to the scene, and each was found to possess a loaded hand gun. Two other loaded guns were found in the car.

While the furtive and devious movements of drug conspiracies such as this are unfortunately routinely encountered in the federal courts of this circuit, the detailed facts which amply document and support the Government's case here, are uniquely provided by the informant witness Stewart, whose regular reports to Government agents enabled them to independently make surveillance and confirm the conspiracy and the overt acts charged in the indictment. Thus Stewart's "sample" of cut cocaine received from Bynum on January 10, 1971 was turned over to agents on January 19, 1971. The $65,000 in cash delivered to Stewart on February 25, 1971 at Bynum's request was later photographed by agents. Birnbaum's attempted delivery on March 2, 1971 was subjected to surveillance by agents. The Altamura sale on March 29, 1971 and the subsequent cutting operation were observed by agents. The April 9, 1971 Tuzzolino sale and cutting operation were also under surveillance, with Stewart managing to discard packages which were recovered by agents who were able to determine that pure heroin traces still adhered to the original containers.

II. A Single Conspiracy

Defendants Birnbaum, Altamura, Tuzzolino, Coniglio, Mele, Wright, Small, Mitchell, Garnett and Dyson, seek reversal of their convictions on the ground that the Government did not prove one conspiracy but rather multiple individual conspiracies. *Kotteakos* v. *United States*, 328 U.S. 750 (1946). The Government established beyond a reasonable doubt a large scale drug sale conspiracy in

this case between January 1970 and April 1971. The pattern is now familiar. Raw drugs in large quantities have to be imported and supplied. In this case the core operators Bynum and Cordovano, respectively, supplied the capital and the contact with the suppliers who provided the raw material. The raw drugs then had to be adulterated or cut, packaged and then resold to purchasers who eventually made them available to the victims. In more normal business ventures this would be described as a vertically integrated loose-knit combination. The point of course is that each level of the operation depends upon the existence of the other, and the mutual interdependence of each is fully understood and appreciated by the other. This knowledge on the part of Bynum and Cordovano operating in the middle layer is obvious. The supplier defendants Birnbaum, Altamura, Feroldi, Tuzzolino, Coniglio and Mele could not reasonably suppose that the large amounts of raw cocaine and heroin received by Bynum and Cordovano were not to be resold at the tremendous profits this business produces. The defendants Wright, Small, Mitchell, Garnett and Dyson who participated in the cutting, repackaging and distribution of the drugs understood fully the roles of Bynum and Cordovano and that suppliers of the raw drugs had to be involved. This is the usual chain conspiracy encountered in drug cases. "Thus the conspirators, at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers. That being true, a jury might have found that all the accused were embarked upon a venture, in all parts of which each was a participant, and an abettor in the sense that the success of that part with which he was immediately concerned, was dependent upon the success of the whole." *United States* v. *Tramaglino*, 197 F.2d 928, 930 (2d Cir.), *cert. denied*, 344 U.S. 864 (1952), quoting *United States* v. *Bruno*, 105 F.2d

921, 922 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939). See also *Blumenthal* v. *United States*, 332 U.S. 539 (1947); *United States* v. *Vega*, 458 F.2d 1234 (2d Cir. 1972); *United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). The fact that not all of the defendants may have known and worked directly with all of the others is not significant since it is clearly established that each knew from the scope of the operation that others were involved in the performance of functions vital to the success of the business. *United States* v. *Calabro*, 467 F.2d 973, 982-83 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).

The on-going nature of the partnership here and the roles assigned to the cast were established clearly in the record. The period of the conspiracy here, moreover, is comparatively short (16 months compared to 9 years in *United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965)), so that the participation of the defendants in the Bynum-Cordovano Harlem operation is more easily established.

With respect to the individual defendants who claim discrete conspiracies, we find ample proof of participation in the single conspiracy charged within the principles enunciated in the prior cases. Wright, Small, Garnett and Dyson were closely allied with Bynum and Cordovano in the cutting and packaging operation. Garnett and Dyson were girlfriends of Bynum, and Wright had worked for him for many years. They were obviously trusted associates. Wright's presence at cutting operations on the evening of January 10, 1971 was established. Moreover, Wright warned of police activity which resulted in a changing of plans as to the place of cutting. He was present later that evening at Garnett's home where Cordovano had produced 5 kilos of heroin and received ½ kilo from

Bynum. On March 29 he was also present at the cutting operation and departed with one of the three bundles of adulterated heroin. Small, a friend and part-time employee, and Mitchell, also a friend of Bynum, were present at the March 29 cutting party and were assigned the two other bundles. Small was also present at the cutting operation on April 9, 1971. It is clear that the relationship here among the cutters and distributors was continuing, intimate and pursuant to common scheme or plan.

The connections of the suppliers with the operation were broad and extensive. Coniglio and Mele made the $72,500 sale to Cordovano in September, 1970. In January, 1971, they advised Stewart of the lack of heroin on the market and offered to sell 5 kilos to Cordovano in April, 1971, for $100,000. Their continuing willingness to participate is patent. Altamura supplied Cordovano with the 5 kilos of cocaine cut on January 11, 1971; he drove Cordovano to meet Bynum in February, 1971; he attempted to purchase 10 kilos of heroin at the same time; he spoke to Cordovano and Stewart numerous times in February and March, and finally delivered 2 kilos of heroin on March 29, 1971. He was entrusted with $49,000 in cash to make a purchase for the partnership. Birnbaum, who initially introduced a buyer to Cordovano and Stewart in the summer of 1970, appeared as a seller in February, 1971, offering Cordovano and Bynum 5 kilos of heroin for $90,000. He and his source, Feroldi, continued to promise delivery and on March 13 a kilo sale of heroin resulted after Feroldi had been given $15,000 and a gun by Cordovano. Feroldi promised to continue to search for a source. On March 2, 1971, Birnbaum had been entrusted with $38,000 to make a heroin purchase which was never consummated and the money was returned. Tuzzolino appears in April, 1971, as a prospective supplier of 5 kilos of heroin for $105,000 and was entrusted with $15,000 in cash. After several meetings, a 2 kilo sale was transacted.

While some of the suppliers may not have known the identity of other sellers, the inference was justified that each knew his supplies were only a small part of the raw drugs which the extensive Bynum-Cordovano operation processed and sold. See *Blumenthal* v. *United States, supra,* 332 U.S. at 554-55 n.14. In view of the large amounts of hard drugs involved and the large amounts of money advanced to suppliers, there is no question but that the Bynum-Cordovano partnership was conducting a regular business on a steady basis with numerous suppliers who intentionally and knowingly were either looking to or maintaining a close relationship with a solvent, on-going apparatus.

III. Severance

A. *The Court's Charge*

In view of this evidence of one conspiracy, the refusal to grant severances was proper. Some of the appellants, notably Mele and Coniglio, argue that there was prejudice in failing to sever since the court below charged: "if you find that the Government has failed to prove the existence of only one conspiracy you must find the defendants not guilty." This is urged to be a prejudicial "all or nothing charge" condemned by this court in *United States* v. *Borelli, supra,* and in *United States* v. *Kelly,* 349 F.2d 720 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966). The argument in essence is that no jury would acquit *all* of the defendants since Bynum and Cordovano were clearly active in all of the ventures undertaken by the group. Hence the jury would convict all rather than let the principal malefactors go free. We cannot accept the argument since it fails to consider other portions of the trial court's charge which made it perfectly clear to the jury that if each of the defendants was not a knowing participant in the single

conspiracy he must be acquitted. In short it was not an "all or nothing charge." The court carefully charged:

> In determining whether any defendant was a party, each is entitled to individual consideration of the proof respecting him or her, including any evidence of his or her knowledge or lack of knowledge, his or her status as a partner, manager or supervisor, his or her participation in key conversations, his or her participation in the plan, scheme or agreements alleged.
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> If you decide that the charged conspiracy existed between any of the defendants, you must then decide as to each defendant individually whether he or she joined the conspiracy with knowledge of either one or both of its purposes as alleged in the indictment.

Judge Pollack meticulously charged the elements and characteristics of the single conspiracy and summarized the Government's evidence as to each defendant and the evidence, if any, of each defendant who presented testimony. This alone takes up eighteen pages of the record. The contention therefore that the charge was prejudicial and in violation of *Borelli* and *Kelly,* is unsupportable.

The principal thrust of appellants' argument that multiple conspiracies existed rather than the single conspiracy charged in the indictment, lies not in the drug supply process and sales activity of the defendants but rather in the evidence presented to the jury of the attempted robbery and shooting of Martin Carlin, the planned robbery of the drug dealers in Washington, and the plan to murder the New York City policeman, Wollack. Those defendants, pri-

marily Bynum and Cordovano, who participated in the crimes, claim that they were prejudiced by the evidence of "other crimes" and those conspirators who were not directly implicated claim prejudice by the "spill over" effect on the jury which would prejudice their right to a fair trial. *Kotteakos* v. *United States, supra.*

The actual participants in the crimes rely on the line of cases presented by *United States* v. *Byrd,* 352 F.2d 570 (2d Cir. 1965), and *United States* v. *Deaton,* 381 F.2d 114 (2d Cir. 1967), which hold that evidence of other crimes is admissible except when offered solely to prove criminal character. The other defendants maintain they were not responsible for the violent acts since these crimes were not within the fair import of the conspiracy as they understood it (*United States* v. *Peoni,* 100 F.2d 401, 403 (2d Cir. 1938)), and thus the trial court erred in not granting them a severance.

In this case the planned robberies and murder were not "other crimes" at all; they were part and parcel of the single drug conspiracy charged in the indictment. E.g., *United States* v. *Leftwich,* 461 F.2d 586, 589 (3d Cir. 1972); *United States* v. *Perico,* 425 F.2d 1375, 1384 (2d Cir.), *cert. denied,* 400 U.S. 869 (1970); *Ignacio* v. *Territory of Guam,* 413 F.2d 513, 519-20 (9th Cir. 1969), *cert. denied,* 397 U.S. 943 (1970); *Rodriguez* v. *United States,* 284 F.2d 863, 867 (5th Cir. 1960), *cert. denied,* 368 U.S. 1001 (1962). Moreover, as to the other defendants, these were not extramural frolics of wanton criminals introduced by the Government to establish to the jury that wicked men were in the dock. The Bynum-Cordovano group which was conducting an enormously profitable business, was faced early in 1971 with a shortage of heroin and cocaine. They discussed this with their suppliers and were desperately seeking new

sources of hard drugs. The planned theft from Carlin, a drug dealer, was to supply heroin for the purpose of the conspiracy. His shooting was in furtherance of that purpose. The aborted Washington burglary was conceived by Cordovano and Bynum for the purpose of obtaining heroin and money. The planned killing of Wollack was to silence a suspected informant and thus to preserve the viability of the conspiracy.[3] The suppliers here were acutely aware of the shortage; that the "core group" would resort to violence to secure hard drugs or to protect the venture, could hardly be unanticipated or unexpected. See *Rodriguez* v. *United States, supra.*

We fail in any event to appreciate the defendants' argument that evidence of these crimes was so prejudicial as to arouse the "irrational passions of the jury" (*United States* v. *Kaufman*, 453 F.2d 306, 311 (2d Cir. 1971)), or to create in the jury "overmastering hostility." C. McCormick, Evidence § 190, at 453 (2d ed. E. Cleary 1972). Whether or not a jury will be so inflamed by allegedly extraneous criminal activity will of course depend upon what crime they have been accused of committing. *United States* v. *Williams*, 470 F.2d 915, 918 (2d Cir. 1972). The appellants here were engaged for profit in a major hard drugs venture in Harlem which not only dehumanized its ultimate customers but unquestionably spawned myriad crimes in a community already misery-ridden. No jury in New York can be unaware of the dimensions and consequences of the major operation which was graphically portrayed here. The revulsion of the average citizen to this traffic need not be documented. How evidence of the concomitant robbery, assault or even planned murder here

[3] See C. McCormick, Evidence § 190, at 451 & n.48 (2d ed. E. Cleary 1972).

could be so exacerbating as to render the jury's judgment irrational, we are unable to understand. We are not dealing with minor league addicted street pushers but with well-financed brazen professionals engaged in a large-scale criminal undertaking in which corruption and violence are endemic. The euphemistic description of these activities as transactions in "contraband" does not disguise the true nature of the wicked alliance here established. Moreover, the trial judge's careful marshaling of the evidence, as we have pointed out, made it clear that the participation of each defendant must be determined by his own actions and not the acts of the others. The jury therefore was capable of determining which defendants had participated in the violence.

IV. The Wire Taps

The Government was authorized by District Judge Anthony J. Travia, Eastern District of New York, on January 29, 1971 to overhear and electronically record telephone conversations at the home of the defendant Garnett, Bynum's girfriend; her home was the site of subsequent meetings and cutting operations of the defendants. The order was based on an affidavit stating that four reliable informants had indicated that Bynum was engaged in a large drug distribution business and used Garnett's phone in this business. The affidavit further recited that Bynum had corrupted state and federal officers, that he had a previous narcotics conviction, and that he was reputed to have caused the killing of some 18 people. The order authorized the wiretap for 20 days and contained the statutory directive (18 U.S.C. § 2518(5)) that the interception of communications be conducted in such a way as to minimize the interception of communications not otherwise subject to interception. On February 12, 1971, a second wiretap was authorized on another phone in the

Garnett residence for 20 days duration.[4] The tap on the first phone was extended by Judge Travia on February 18, 1971 until March 3, 1971 so that it expired on the same day as the second tap. For five weeks these phones were monitored and conversations were recorded, eight of which were introduced at the trial and played for the jury. The issuance of the authorization for the wiretap and the recordation of the conversations of some of the defendants has given rise to a number of arguments on appeal.

A. *Authorization and Necessity*

Appellants claim that the application for the wiretap order was improperly authorized since the application was not approved by the Attorney General or a specially designated Assistant Attorney General as required by statute (18 U.S.C. § 2516(1)) but rather by an Executive Assistant to the then Attorney General. The precise question has been before this court on several occasions and has been decided adversely to appellants' position, and we are now bound by these precedents. *United States* v. *Becker*, 461 F.2d 230, 235-36 (2d Cir. 1972); *United States* v. *Pisacano*, 459 F.2d 259 (2d Cir. 1972).[5]

It is further urged that the applications for the wiretaps were defective in failing to establish that resort to this means of surveillance was necessary as required by

[4] Bynum learned of the first proposed wiretap *before* Judge Travia signed the authorization. He had the second phone installed and the agents learned of this through their tap on the first phone.

[5] We note that the federal courts are divided on this question. See *United States* v. *Roberts*, 477 F.2d 57 (7th Cir. 1973); *United States* v. *Giordano*, 469 F.2d 522 (4th Cir. 1972), *cert. granted*, 411 U.S. 905 (1973).

18 U.S.C. § 2518(1)(c). A reading of the detailed affidavits which were submitted in support of the wiretap and which form part of this record, indicating reason to believe that Bynum had engaged in the corruption of officials and violence against informants, and that he was a long time narcotics violator, amply supports the issuance of the orders here made.

B. *Minimization*

The remand for an evidentiary hearing here was prompted by the argument on the initial appeal in this case that there was a failure by the Government to minimize the interception of innocent conversation on the two telephones tapped at 855 Linden Boulevard, in violation of 18 U.S.C. § 2518(5) which mandates the inclusion of a "minimization" provision in the order authorizing the electronic surveillance. District Judge Pollack held such evidentiary hearings on April 9, May 10, 11 and 14, 1973. On June 6, 1973 he filed a 20 page opinion containing findings of fact and conclusions of law, in which he made an exhaustive analysis of the calls which were intercepted, the identity of the conversants, the length of the calls, the actual conduct of the surveillance by the Assistant United States Attorney and the inspectors of the Bureau of Narcotics and Dangerous Drugs (BNDD) and the continuing supervision of Judge Travia, to whom the Government was reporting regularly pursuant to his order. Judge Travia also appeared as a witness in the hearing before Judge Pollack. In view of the extensive opinion below, we see no point in repeating the minutiae necessarily developed in the record analyzing the surveillance.

We commence with the observation that the mere fact that every conversation is monitored does not necessarily render the surveillance violative of the minimization re-

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quirement of the statute. See *United States* v. *Cox,* 462 F.2d 1293, 1301 (8th Cir. 1972); *United States* v. *Leta,* 332 F. Supp. 1357, 1360 n.4 (M.D. Pa. 1971). It is also obvious that no electronic surveillance can be so conducted that innocent conversation can be totally eliminated. Before a determination of innocence can be made there must be some degree of eavesdropping. The record here discloses that out of 2058 completed phone calls, 1277 of them (more than half) were completed in less than 2 minutes. Since, in a case of such wide-ranging criminal activity as this, it would be too brief a period for an eavesdropper even with experience to identify the caller and characterize the conversation as merely social or possibly tainted, we eliminate these calls from consideration. See *United States* v. *Sisca,* 72 Cr. 1159, at 22-23 (S.D.N.Y. June 25, 1973); *United States* v. *Focarile,* 340 F. Supp. 1033, 1050 (D. Md.), aff'd sub nom. *United States* v. *Giordano,* 469 F.2d 522 (4th Cir. 1972), cert. granted, 411 U.S. 905 (1973); *United States* v. *La Gorga,* 336 F. Supp. 190, 196 (W.D. Pa. 1971). Our concern is with the 781 conversations which lasted 2 or more minutes.

In determining whether or not these calls were susceptible to minimization, there is patently no mechanical, hard and fast formula applicable. We look first to determine whether or not the Government could anticipate or, during the course of the surveillance, detect some pattern of innocent conversation which could be eliminated from scrutiny. The facts and events detailed earlier in this opinion supported the Government's expectation at the time of the initiation of the taps, that Bynum was operating a massive drug business headquartered at 855 Linden Boulevard. We cannot accept appellants' suggestion that this was just another large drug operation. The conspiracy here unveiled was not limited to drug peddling, but included larceny, robbery and murder among its ingredients. The taps were further authorized because Bynum was suspected of corrupting local police as well as federal agents to assure the continuing success of the venture. Bynum, as we have indicated, was no pedestrian punk or common hoodlum. He had acted as an informant for the Government in previous drug cases and was well versed in narcotic investigative techniques. His contacts included not only law enforcement agents but also corrupt attorneys who were suspected of being implicated in the drug operation. He arrived in New York in modest circumstances at best and within several years, according to his own testimony, had attained a net worth of more than a million dollars and a taxable income in 1971 of $120,000 allegedly on income from "legitimate" businesses, including a clothing store, record shop and the "Kosher" wholesale meat market which he operated with Cordovano (and which, had it not been for the intervention of the authorities, would have been the situs for the murder of Patrolman Wollack).

Even more grotesque is the fact that Bynum testified that through a contact in the Telephone Company, whom he named, he was made aware almost immediately of the existence of both of the taps made on the phones at 855 Linden Boulevard. It is incongruous therefore to advert to an expectation of privacy (*United States* v. *Katz,* 389 U.S. 347, 351-53 (1967)) under circumstances such as these. See *United States* v. *Pui Kan Lam,* slip op. 4991, 4997-99 (2d Cir. Aug. 21, 1973). Although Bynum did reside at this address with one of his mistresses (Garnett) and his child, it can hardly be characterized as such a normal domestic menage, that the Government could have anticipated some pattern of orthodox social calls. On the contrary, the reasonable anticipation on the part of the Government, as the court below recognized, was that surreptitious, illegal activity would be conducted on the premises and over the tele-

phone. Furthermore, while natural caution dictates that drug related conversations will be disguised and cryptic, in view of Bynum's awareness of the surveillance, the efforts to obfuscate and confuse the eavesdropper would have been more pronounced than usual.

In view of all of these factors we cannot conceive that either the Assistant United States Attorney or Judge Travia could formulate any detailed screening instructions which could effectively minimize licit telephone interception. The record below establishes that on January 29, 1971, the Assistant United States Attorney and two inspectors of the BNDD submitted to Judge Travia the application for surveillance and personally discussed the breadth of the conspiracy and the difficulties embraced in the surveillance. The record makes it apparent that all were fully aware of the statutory requirements, including the minimization provision and the need to screen out innocent calls. Since it was known that lawyers were suspected of involvement, monitoring agents were specifically instructed not to intercept privileged conversations. The calls were in fact received and monitored but no serious argument is made here that privileged calls were intercepted. For the first time in New York apparently, in view of the charge of corruption, out-of-town BNDD agents, all of the rank of Inspector, were imported to conduct the surveillance and, in order to cope with the jargon anticipated, 2 were assigned in tandem to each tap on a 24 hour basis. Judge Travia moreover insisted upon written reports on a regular basis covering short periods of the tap. In addition to written summaries and detailed logs which were submitted to him on February 4, 8, 16, 18, 24 and March 1 and 8, 1971, there were supplemental meetings and conversations throughout the period of the surveillance. In our view, the degree of judicial supervision

is an important factor in determining whether a good faith effort to minimize was attempted. See *United States* v. *Cox, supra,* 462 F.2d at 1301. We agree with the finding of the court below that the taps were closely and conscientiously supervised by Judge Travia.

The Government maintains that in fact 85% of the conversations recorded were relevant to the authorized investigation. We are, however, unable to determine whether the estimate is accurate. Statistics in this area are properly suspect. What is significant in our view is that appellants' principal contention on appeal on this issue is that some 73 calls of 3 minutes or more duration involved conversations between Bynum's infant's babysitter, Donna, and her friends and classmates which were clearly innocent. The argument is made that in view of the length of the investigation and the pattern of innocence emerging from these calls, they should not have been intercepted.

The Government's contention in response, that although all conversations were recorded only 90% of them were in fact monitored by the agents, is not persuasive. We need not determine, however, whether the interception prohibited by the statute is aural intrusion or mechanical recordation.[6] The difference here between what was monitored

[6] The court below held, and the Government argues here, that the statutory provision requiring that interceptions of communications be minimized (18 U.S.C. § 2518(5)) was intended to limit only the hearing and not the recordation of conversations. Authority for this view is said to be found in the words of the statute itself. The statute defines "intercept" as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). The statute also draws a distinction between interception and recordation in § 2518(8)(a), which requires that the "contents of any . . . communication intercepted by any means

[Footnote continued on following page]

and what was recorded is insignificant and in fact not measurable (having been based on one agent's estimate). Assuming arguendo that there was a total interception of all of Donna's calls, we do not find a violation of the statute or any constitutional infirmity in their interception.

Our own examination of the logs supports the contention that Donna's conversations with friends were banal and for the most part devoid of content which would assist the investigation at issue. Of course, in making this retrospective judgment that the Donna calls were innocent, we enjoy the acuity of hindsight. *United States* v. *La Gorga, supra,* 336 F. Supp. at 196. While such conversations might well commence with teenage trivia, the eavesdropper, unless possessed of the prescience of a clairvoyant, could hardly predict when they might become relevant or when they might be interrupted by an adult with more pressing problems. *Id.* The record in fact reveals that Donna's innocence did not immediately become apparent. Even

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authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device." Any recording made under this subsection is to be "done in such a way as will protect the recording from editing or other alterations." See *United States* v. *Huss,* slip op. 4439, 4457-59 (2d Cir. June 26, 1973).

Appellants respond that the statute was never intended to permit recordation of all conversations. Such a construction would, in their view, allow the Government or anyone else to legally create a tape library of the conversations of any citizen. If such reasoning were applied to the situation of a warrant covering tangible items, seizure of the contents of a whole house would be permissible, in their view, on the ground that to do so would prevent any destruction or disappearance of exculpatory evidence. Appellants contend that this question has been resolved in their favor by earlier cases (*United States* v. *King,* 335 F. Supp. 523 (S.D. Cal. 1971), *rev'd on other grounds,* 478 F.2d 494 (9th Cir. 1973); *United States* v. *Leta,* 332 F. Supp. 1357, 1360 n.4 (M.D. Pa. 1971).

when it became obvious, Donna was also used to transmit messages and on occasion did reveal the whereabouts of Bynum and the company he was keeping.

Considering all of the circumstances set forth—the broad range of alleged criminality, Bynum's awareness of the taps, the supervision by Judge Travia—we agree with the court below that there was no violation of the minimization requirement of the statute.

V. Other Arguments

Appellant Bynum argues that he was denied the effective assistance of trial counsel because his trial counsel had at one time represented the Government witness Stewart. Appellant relies on a recent decision of this court, *United States* v. *Alberti,* 470 F.2d 878 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973) for the proposition that the trial judge should have conducted a hearing to determine whether or not a conflict exists. Contrary to his present position, the record contains an affidavit by Bynum indicating that he knew of his counsel's representation of Stewart at the beginning of the trial. Although Bynum was represented by two attorneys throughout the trial, no request for a hearing on this question was even made until after the trial, and then on the basis of newly discovered evidence. It was properly denied by the trial judge. The representation of Stewart by Bynum's trial counsel was in a totally unrelated matter, an assault charge in a state court. There is no prejudice in any event since Stewart was acquitted and any avenue of cross-examination on this point would be fruitless. Moreover, the court below found that trial counsel had represented Bynum in an extremely competent manner. Under these circumstances we find no possible conflict of interest. *Olshen* v. *McMann,* 378 F.2d 993, 994 (2d Cir.), cert. denied, 389 U.S. 874 (1967).

Appellant Birnbaum claims that there was reversible error committed because Stewart referred to the fact that Birnbaum was in jail for several months. The record discloses that the trial judge promptly admonished the jury to disregard and completely erase the remark from their minds. There is no basis for reversal. *United States* v. *Strombery*, 268 F.2d 256, 269 (2d Cir.), cert. denied, 361 U.S. 863 (1959).

In his "Reply and Supplemental Brief" appellant Altamura urges that the trial judge committed "plain error" in failing to charge the jury on the law and facts in regard to his alibi defense. Having failed to either request such a charge or to make a timely objection in accord with Fed. R. Crim. P. 30, Altamura cannot complain now. *Goldsby* v. *United States*, 160 U.S. 70, 77 (1895); *Lewis* v. *United States*, 373 F.2d 576, 579 (9th Cir.), cert. denied, 389 U.S. 880 (1967); *United States* v. *Tramaglino, supra*, 197 F.2d at 932.

Appellants Mele and Coniglio complain that unique circumstances prevented the latter from testifying at the trial. In June 1971 Coniglio was convicted after a jury trial in the Eastern District of New York, of violating the narcotics laws. On June 15, 1972, this court reversed that conviction because the prosecution had suppressed certain relevant evidence. *United States* v. *Mele*, 462 F.2d 918 (2d Cir. 1972). Thus the argument is that had Coniglio testified in the instant April-May, 1972 trial, he would have been subjected to damaging cross-examination about his prior narcotics conviction, a conviction eventually overturned because of prosecutorial misconduct. The fallacy lies in the fact that Coniglio possessed, and failed to exercise, the right to request a prior ruling from the trial judge on whether the earlier conviction could be used on cross-examination. See, e.g., *United States* v. *Palumbo*, 401 F.2d 270 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969). Having neglected to make such an application below, the appellants are now in no position to urge that Coniglio was unfairly prevented from testifying.

Levis Nedd, along with some of the other defendants, complains that his in-court identification by Martin Carlin, the victim of the robbery, was the product of an impermissibly suggestive photographic display. Of course, "our inquiry must be whether under all circumstances [the allegedly improper photographic display] gave rise to a very substantial likelihood of irreparable misidentification. . . . Moreover, in determining whether or not the suggestive photographic identification procedure resulted in misidentification, we may properly consider the other factors which were before the jury and were properly admissible which tend to establish that there was not substantial likelihood of misidentification." *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797, 801, 803-04 (2d Cir. 1973). Even assuming that the photographic display was impermissibly suggestive, the other evidence against Nedd was so overwhelming that the possibility he was the victim of misidentification is remote in the extreme. Stewart not only testified that Nedd was in on the planning of the robbery, but also related a subsequent conversation in which Nedd graphically described the circumstances surrounding his shooting of Carlin. In addition, when arrested in New Jersey, Nedd possessed jewelry and rings stolen from Carlin as well as an identification taken from another victim of the attempted robbery. See *United States ex rel. Springle* v. *Follette*, 435 F.2d 1380 (2d Cir. 1970), cert. denied, 401 U.S. 980 (1971). There was no constitutional infirmity here.

We have considered all arguments urged on us by appellants and find them to be without merit.

Affirmed.

APPENDIX D

Order of the Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirty-first day of October, one thousand nine hundred and seventy-three.

Present: HON. IRVING R. KAUFMAN,
Chief Judge,

HON. J. JOSEPH SMITH,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

72-1857, 72-1884, 72-2101,
72-1763, 72-2142-3

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

ELVIN LEE BYNUM, a/k/a Al, a/k/a Big Al, JOSEPH CORDOVANO, a/k/a Joey, Joe Carr, Joe the Butcher, ABRAHAM WRIGHT, LANCE SMALL, NEWBRY MITCHELL, LILLIAN EVERETT BYNUM, a/k/a "Chink", FANNIE MAE GARNETT, a/k/a Mae, JACQUELINE FULLER DYSON, a/k/a Jackie, JOHN CONIGLIO, a/k/a Giggsy, ANGELO MELI, VINCENT ALTAMURA, a/k/a Vinnie, "V", STANLEY SHERMAN, IRVING BIRNBAUM, CHARLES MOODY, JOHN FEROLDI, CHARLES TUZZOLINO, a/k/a Mr. Brooks, LEVIS NEDD, MICHAEL LEBBERS, a/k/a Mike the Irishman,
Defendants,

Appendix D
Order of the Court of Appeals Denying Rehearing

ELVIN LEE BYNUM, a/k/a Al, a/k/a Big Al, JOSEPH CORDOVANO, ABRAHAM WRIGHT, LANCE SMALL, NEWBRY MITCHELL, FANNIE MAE GARNETT, a/k/a Mae, JACQUELINE FULLER DYSON, a/k/a Jackie, JOHN CONIGLIO, a/k/a Giggsy, ANGELO MELI, VINCENT ALTAMURA, a/k/a Vinnie "V", IRVING BIRNBAUM, JOHN FEROLDI, CHARLES TUZZOLINO, a/k/a Mr. Brooks, LEVIS NEDD,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

APPENDIX E

Order of the Court of Appeals Denying Rehearing In Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirty-first day of October, one thousand nine hundred and seventy-three.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

ELVIN LEE BYNUM, a/k/a Al, a/k/a Big Al, JOSEPH CORDOVANO, a/k/a Joey, Joe Carr, Joe the Butcher, ABRAHAM WRIGHT, LANCE SMALL, NEWBRY MITCHELL, LILLIAN EVERETT BYNUM, a/k/a "Chink", FANNIE MAE GARNETT, a/k/a Mae, JACQUELINE FULLER DYSON, a/k/a Jackie, JOHN CONIGLIO, a/k/a Giggsy, ANGELO MELI, VINCENT ALTAMURA, a/k/a Vinnie, "V", STANLEY SHERMAN, IRVING BIRNBAUM, CHARLES MOODY, JOHN FEROLDI, CHARLES TUZZOLINO, a/k/a Mr. Brooks, LEVIS NEDD, MICHAEL LEBBERS, a/k/a Mike the Irishman,
Defendants,

ELVIN LEE BYNUM, a/k/a Al, a/k/a Big Al, JOSEPH CORDOVANO, ABRAHAM WRIGHT, LANCE SMALL, NEWBRY MITCHELL, FANNIE MAE GARNETT, a/k/a Mae, JACQUELINE FULLER DYSON, a/k/a Jackie, JOHN CONIGLIO, a/k/a Giggsy, ANGELO MELI, VINCENT ALTAMURA, a/k/a Vinnie "V", IRVING BIRNBAUM, JOHN FEROLDI, CHARLES TUZZOLINO, a/k/a Mr. Brooks, LEVIS NEDD,
Defendants-Appellants.

Appendix E
Order of the Court of Appeals Denying Rehearing in Banc

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge

APPENDIX F

Statute Involved — 18 United States Code, Chapter 119, §§ 2510-2520

WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

Sec.

2510. Definitions.

2511. Interception and disclosure of wire or oral communications prohibited.

2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited.

2513. Confiscation of wire or oral communication intercepting devices.

2514. Immunity of witnesses.

2515. Prohibition of use as evidence of intercepted wire or oral communications.

2516. Authorization for interception of wire or oral communications.

2517. Authorization for disclosure and use of intercepted wire or oral communications.

2518. Procedure for interception of wire or oral communications.

2519. Reports concerning intercepted wire or oral communications.

2520. Recovery of civil damages authorized.

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§ 2510. *Definitions*

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof,

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(i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

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(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Added Pub. L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 212.

§ 2511. Interception and disclosure of wire or oral communications prohibited.

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

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(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations, of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

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(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

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Added Pub. L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 213, and amended Pub. L. 91-358, Title II, § 211(a), July 29, 1970, 84 Stat. 654.

§ 2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who willfully—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use

of such device for the purpose of the surreptitious interception of wire or oral communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce.

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

Added Pub.L 90-351, Title II, § 802, June 19, 1968, 82 Stat. 214.

§ 2513. Confiscation of wire or oral communication intercepting devices

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 215.

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§ 2514. Immunity of witnesses

Whenever in the judgment of a United States Attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

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Repeal

Pub.L. 91-452, Title II, §§ 227(a), 260, Oct. 15, 1970, 84 Stat. 930, 931, repealed this section effective four years following the sixtieth day after the date of the enactment of Pub.L. 91-452, which was approved Oct. 15, 1970, with such repeal not to affect any immunity to which any individual is entitled hereunder by reason of any testimony or other information given before such day.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications

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by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of

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racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) Any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the

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applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 80—351, Title III, § 802, June 19, 1968, 82 Stat. 216, and amended Pub.L. 91—452, Title VIII, § 810, Title IX, § 902(a), Title XI, § 1103, Oct. 15, 1970, 84 Stat. 940, 947, 959; Pub.L. 91—644, Title IV, § 16, Jan. 2, 1971, 84 Stat. 1891.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained

knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Added Pub.L. 90—351, Title III, § 802, June 19, 1968, 82 Stat. 217 and amended Pub.L. 91—452, Title IX, § 902(b), Oct. 15, 1970, 84 Stat. 947.

Appendix F

Statute Involved — 18 United States Code, Chapter 119, §§ 2510-2520

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the

Appendix F
Statute Involved — 18 United States Code, Chapter 119, §§ 2510-2520

authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about

to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to

whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must

terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activites characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately

terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for in-

spection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Added Pub. L. 90—351, Title III, § 802, June 19, 1968, 82 Stat. 218 and amended Pub.L. 91—358, Title II, § 211(b), July 29, 1970, 84 Stat. 654.

§ 2519. *Reports concerning intercepted wire or oral communications.*

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made sure such order or extension, including (i) the approximate nature and frequency of incriminat-

ing communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed

with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

Added Pub. L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 222.

§ 2520. *Recovery of civil damages authorized.*

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

Added Pub. L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 223, and amended Pub. L. 91-358 Title II, § 211(c). July 29, 1970, 84 Stat. 654.

APPENDIX G

MEMORANDUM DECISION OF THE SUPREME COURT OF THE UNITED STATES 416 U.S.—(May 28, 1974)

Supreme Court of the United States

No. 73-856

ELVIN LEE BYNUM, et al.,

Petitioners,

—v.—

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Facts and opinion, D.C., 360 F. Supp. 400; 485 F.2d 490; 475 F.2d 832.

May 28, 1974. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Petition for writ of certiorari granted, judgment vacated and case remanded to the Court of Appeals for further consideration in light of *United States* v. *Giordano,* 416 U.S. —, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974).

Mr. Justice Douglas would reverse judgment. *United States* v. *Giordano,* 461 U.S. —, 94 S. Ct. 1820, 40 L. Ed. 341 (1974) and *United States* v. *Chavez,* 416 U.S. —, 94 S. Ct. 1849, 40 L. Ed. 2d 380 (1974) (Douglas, *J.*, dissenting).

APPENDIX H
Order of Court of Appeals
(June 18, 1974)

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of June, one thousand nine hundred and seventy-four.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ELVIN LEE BYNUM, a/k/a Al, a/k/a Big Al, JOSEPH CORDOVANO, a/k/a Joey, Joe Car, Joe the Butcher, ABRAHAM WRIGHT, LANCE SMALL, NEWBRY MITCHELL, LILLIAN EVERETT BYNUM, a/k/a Chink, FANNIE MAE GARNETT, a/k/a Mae, JACQUELINE FULLER DYSON, a/k/a Jackie, JOHN CONIGLIO, a/k/a Giggsy, Angelo Meli, VINCENT ALTAMURA, a/k/a Vinnie, V, Stanley Sherman, Irving Birnbaum, et al.,

Defendants,

ELVIN LEE BYNUM, a/k/a Al, a/k/a Big Al, JOSEPH CORDOVANO, a/k/a Joey, Joe Carr, Joe the Butcher, ABRAHAM MITCHELL, FANNIE MAE GARNETT, a/k/a Mae, et al.,

Defendants-Appellants.

It is hereby ordered upon consideration of the motion made herein by counsel for the appellee by notice of motion dated May 30, 1974 to remand this action to the United States District Court for the Southern District of New York for further consideration in the light of *United*

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APPENDIX H—Order of Court of Appeals
(June 18, 1974)

States v. *Giordano,* 43 U.S. Law Week 4641 (May 13, 1974) and *United States* v. *Chavez.* The judgment of this court is vacated pursuant to the order of the Supreme Court of the United States dated May 28, 1974, and the case is hereby remanded to the United States District Court for the Southern District of New York for further consideration in light of *United States* v. *Giordano* and *United States* v. *Chavez.*

IRVING R. KAUFMAN,
Chief Judge

J. JOSEPH SMITH
WILLIAM H. MULLIGAN
Circuit Judges

APPENDIX I
OPINION AND FINDINGS OF DISTRICT COURT
360 F. Supp 400 (December 5, 1974)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Cr. 1169(MP)

UNITED STATES OF AMERICA,

—v.—

ELVIN LEE BYNUM, et al.,

Defendants.

APPEARANCES:

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APPENDIX I—Opinion and Findings of District Court 360 F. Supp. 400 (December 5, 1974)

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LEVIS NEDD, *pro see*

MILTON POLLACK, District Judge.

The defendants herein were convicted by a jury of violations of the narcotics laws with the use on the trial of wiretap evidence. A motion to suppress the intercepted conversations was denied by the District Court and the issue was raised on appeal from the convictions. Before deciding the merits of the appeal, the Court of Appeals remanded the case for a hearing on whether minimization of the wiretap surveillance was properly observed. 475 F.2d 832 (2d Cir. 1973). The District Court found and reported that the minimization measures taken were appropriate under the circumstances, 360 F. Supp. 400, and the Court of Appeals affirmed these findings and affirmed the convictions in all respects. 485 F.2d 490 (2d Cir. 1973). The defendants then sought certiorari from the Supreme Court raising among other points the contention that the authori-

APPENDIX I—Opinion and Findings of District Court 360 F. Supp. 400 (December 5, 1974)

zation for the wiretaps by the Attorney General was defective in that a judicial order granting further time for the wire surveillance had not received the personal approval for the Attorney General.

During pendency of the application for certiorari herein, the Supreme Court decided *United States* v. *Giordano*, 416 U.S. 505 (1974), upholding the grant of a pretrial motion to suppress wiretap evidence where an original intercept order lacked the pre-application personal approval of the Attorney General and an order based thereon had extended the time limit of the intercept authority, and *United States* v. *Chavez*, 416 U.S. 562 (1974), in which pre-application personal approval was in fact given to the original order by the Attorney General but the papers erroneously had attributed the approval to a specially designated assistant and this was held not to invalidate the wire tap order.

Without reaching the merits of defendants' contentions herein (Mr. Justice Douglas dissenting and voting to reverse), the Supreme Court vacated the judgment in this case and remanded it to the Second Circuit Court of Appeals for further consideration in light of *Giordano* and *Chavez*. *United States* v. *Bynum*, 42 U.S.L.W. 3652 (U.S. May 28, 1974). On motion of the government, the Court of Appeals in turn remanded the case to this Court on June 18, 1974 for a hearing and consideration of evidence in light of *Giordano* and *Chavez*.

A hearing was duly held at which the testimony of former Attorney General, John Mitchell, and his assistant, Sol Lindenbaum, was adduced, together with evidence tending to show that the four challenged conversations used on trial must be considered of immaterial effect on the convictions. At the close of the hearing on November 9, 1974, the government suggested that it might consider calling

two additional witnesses to testify on the effect of the questioned interceptions, but the Court concluded that such testimony would be unnecessary at this time in view of the limited remand under which this Court does not reach the question of the effect of those interceptions in obtaining the convictions. The parties thereafter submitted briefs and due deliberation has been had.

The fact which at once sets this case apart from *Giordano* is that there the *initial* wiretap orders did have the pre-application personal approval of Attorney General John Mitchell. This satisfied all requirements of Title III, 18 U.S.C. §§ 2515 *et seq.* Moreover, since all the orders involved herein were based on probable cause, as defendants have conceded, the orders were therefore lawful under the Fourth Amendment.

Briefly,[1] the facts herein are that three wiretap orders (two initial and one extension) were made authorizing interception of communications on residential telephone facilities located in a private single family dwelling at 855 Linden Boulevard, Brooklyn, for which the subscriber was Fred[2] Garnett. The object of the surveillance was the narcotics activities of Elvin Bynum and his cohorts. Two telephone numbers were assigned to these phone facilities, viz., (212) 342-6203 and (212) 346-5992. Both of these were in the premises before the initial wiretap order was made on January 29, 1971 by Judge Travia. The second number

[1] The page number references in this opinion are as follows: an "A" prefix indicates the Second Circuit appendix on the initial appeal following trial (the white volumes); an "H" prefix indicates the Second Circuit Appendix following the minimization hearing before this Court (grey volumes); and a "C" prefix indicates the transcript of the hearings held before this Court on the present remand. "PA" references are to the hearing exhibits.

[2] Fred Garnett was in fact Mae Garnett, a defendant in this case living with Elvin Bynum, the principal defendant.

had been added by the phone company without the knowledge of the government agents while they were preparing and submitting the application to the Attorney General and the Court for their respective approval and authorization.

The chronology is as follows:

On January 14, 1971, the agents of BNDD commenced preparation of an application for surveillance of Bynum's narcotics activities at 855 Linden Boulevard by interception of the telephone communications flowing in and out of the premises and by a bug to be planted in the premises. The application was presented to the Attorney General who personally approved it on January 26th. The application mentioned that the phone facilities bore number (212) 342-6203. Unknown to the government the subscriber, Fred Garnett, ordered installation of a second phone facility on January 26th and it was installed and operative on January 28th. On January 29th Judge Travia issued the original wiretap order for interception during the 20 day period expiring on February 18, 1971 (H 603).

Learning of a second phone installation, the government prepared a further wiretap application which was presented to the Attorney General who personally approved it on February 11, 1971. The application mentioned that the phone facilities to the premises now included number (212) 346-5992. On February 12th Judge Travia issued his second wiretap order (H 639) relating therein the number of the added telephone facility; this similarly authorized interception for a period not to exceed 20 days expiring on March 3, 1971.[3]

[3] Both the January 29th and February 12th orders authorized

(Footnote continued on following page)

APPENDIX I—Opinion and Findings of District Court 360 F. Supp. 400 (December 5, 1974)

On February 18, 1971, Assistant United States Attorney Updike submitted to the Department of Justice an application he proposed to lay before Judge Travia for his authorization of an extension of the time limit of the January 29th order. The Attorney General was absent from Washington on that date and since the proposed time enlargement was within the approved objective, his assistant Sol Lindenbaum authorized AUSA Updike to present the application to Judge Travia who thereupon issued his order of February 18th (H 681) enlarging the time limit of the January 29th order for an additional 14 days so that the expiration of the allowable intercept period under the orders of February 12th and 18th would occur on the same day, March 3, 1971.[4]

The defendants contend that communications intercepted between February 18th and March 3rd over tele-

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(Footnote continued from preceding page)
installation of a bug to obtain conversations from within the premises at 855 Linden Boulevard, but BNDD agents were never able to plant it. See February 12, 1971 Affidavit of Thomas Taylor, para. 14, H652, H657 and AUSA Updike's March 8, 1971 letter to Judge Travia (H724-25).

[4] Interception of communications which took place over the telephone listed as (212) 342-6203 commenced on January 30, 1971 at 9:30 a.m. and continued through February 17, 1971 at 11:50 p.m. when the tap was shut down. The tap was reactivated at 4:35 p.m. on February 18th and terminated on March 3, 1971 at 11:58 p.m. (Letters of AUSA Updike to Judge Travia, February 4, 1971, H635; February 24, 1971, H718-19; and March 8, 1971, H724-25) Interception of communications which took place over telephone line (212) 346-5992 commenced on February 13th at 7:30 a.m. and terminated on March 3rd at 11:57 p.m. (Letters of AUSA Updike to Judge Travia, February 18, 1971, H679; and March 8, 1971, H724-25). Interception of communications over both lines was frequently interrupted by technical difficulties.

APPENDIX I—Opinion and Findings of District Court 360 F. Supp. 400 (December 5, 1974)

phone line (212) 342-6203 or the investigative fruits thereof were improperly admitted into evidence at trial because Attorney General Mitchell did not personally approve on February 18, 1971 the submission to Judge Travia on that date of the application to enlarge the time limit for interception fixed in the Court's order of January 29th 1971.

Burden of Proof

In *United States* v. *Magaddino*, 496 F.2d 455 (2d Cir. 1974) the Court of Appeals of this Circuit set out the rule for burden of proof on the question of the illegality of wiretaps where defendants seek to suppress the evidence obtained therefrom. Quoting *Alderman* v. *United States*, 394 U.S. 165 (1969), which in turn refers to *Nardone* v. *United States*, 308 U.S. 338, 341 (1939), the Court stated at 459-60 that "the burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed." *Accord*, *United States* v. *Covello*, 410 F.2d 536, 548 (2d Cir. 1969), *cert. denied*, 396 U.S. 879 (1969), *reh. denied*, 397 U.S. 929 (1970); *cf. United States* v. *Morin*, 378 F.2d 472, 475 (2d Cir. 1967).

The defendants have failed to prove that wiretapping was unlawfully employed herein.

Summary of Findings

This Court finds that Attorney General Mitchell was not under legal obligation to personally function on February 18, 1971 on the application to enlarge the time limit for authorized interception set out in the Court's order of January 29, 1972. The continued interception of communications over the telephone with the listing (212) 342-6203 during the period February 18 to March 3, 1971

violated neither the Fourth Amendment nor Title III and neither *Giordano* nor *Chavez* is applicable to the facts here present. There is therefore no legal requirement for suppression of the evidence used at trial as will more fully be shown hereafter.

The Court's conclusion that there was no invalidity in the wiretapping may be based on alternative grounds. *First*: former Attorney General Mitchell's personal approval on January 26, 1971 of the application for a wiretap on the original phone was the only action on his part that was required by Title III with respect to that phone no matter what portion of the statutory time limits the judge decided to allow for the interception. The statute, 18 U.S.C. § 2518(5) permits a time limit of 30 days for an original order authorizing a wiretap. This time limit may be extended for up to another 30 days by the Judge supervising the tap. *Id.* The ultimate duration of the wiretap on the phone was in the discretion of the judge issuing the original order, subject to the requirement of continuing probable cause on which he must be satisfied. Judge Travia made the requisite probable cause findings with respect to the original phone facility on January 29, 1971 and again 20 days later on February 18, 1971 when he extended the viability of his original order for another 14 days.

Second: the two telephones were subscribed for in the same name (Fred Garnett), located in the same private residential one family premises, and used by the same individuals for the same illegal purposes; consequently they may be considered to be in effect a single or common unit, and in light of the circumstances, including his action on January 26th, Attorney General Mitchell's personal approval on February 11, 1971, in effect authorized whatever Court applications were necessary to accomplish the ap-

proved objective, which certainly included interception of all communications over all residential phone facilities in the premises during the period February 12 to March 3, 1971. Thus on this alternative, the proposed application to Judge Travia for the February 18, 1971 enlargement of the time limit for interception on the original facility was in effect approved personally by Mitchell on February 11, 1971, rather than improperly approved by Lindenbaum on February 18, 1971.

Similarly, since the two telephones were subscribed for in the same name, located in the same private residential one family premises, and used by the same individuals for the same illegal purposes, they may be considered to be in effect a single or common unit. Thus Attorney General Mitchell's personal approval on February 11, 1971 considered in light of all the circumstances, including his personal approval of the objective given on January 26, 1971, in effect authorized whatever application was necessary to pursue interception of communications over both telephones during the period February 12, 1971 to March 3, 1971, and the February 12, 1971 order *itself* in effect granted authority for a tandem or simultaneous tap on both phones. The February 18, 1971 order was thus a legally unnecessary but proper alignment of the paper record since the time limit expressed in the January 29, 1971 order was 20 days which would expire on February 18th so far as that order is concerned. In addition, in the February 18, 1971 order Judge Travia updated for telephone number (212) 342-6203 the probable cause findings implicit in the February 12, 1971 order as construed above.

The Court's concern here must be in safeguarding the purposes and principles behind Title III and the substance of the authorizations and the adequacy of the warrants

issued to effect those purposes and authorizations. The form of the paperwork utilized is not the criterion to be followed; the substance is the critical consideration. No valid issue of unauthorized invasion of privacy is present or at stake and none collides here with the public interest. *See generally United States* v. *Poeta,* 455 F.2d 117, 121 (2d Cir.), *cert. denied,* 406 U.S. 948 (1972) (inadvertent crossing out of provision that authority would not terminate with first interception); *United States* v. *Bridges,* 419 F.2d 963 (8th Cir. 1969) (common sense reading of affidavit to support finding of probable cause); *State* v. *Bisaccia,* 58 N.J. 586, 279 A.2d 675 (1971) (misidentification of house number because agent thought numbers ran in one direction rather than the other).

I.

Giordano has tersely stated the applicable statutory rule. "The orders themselves must particularize the extent and nature of the interception that they authorize, § 2518 (4), and they expire within a specified time unless expressly extended *by a judge* based on further application by enforcement officials, § 2518(5)." (Emphasis added). 416 U.S. at 514-15. After providing that an initial wiretap order may authorize interception of wire communication, but in no "event longer than thirty days" the statute reads that

> Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. *The period of extension shall be no longer than the authorizing judge deems necessary* to achieve the purposes for which it was granted and in no event for longer than thirty days. (Emphasis added). 18 U.S.C. § 2518(5).

Attorney General Mitchell's approval on January 26, 1971 of the objective to be obtained by wiretap and by planting of a bug in the premises was the only action on his part that was required by Title III with respect to the original phone installation since the time factor involved in reaching the objective was a matter of continuing probable cause to be supervised and determined by the judge issuing the order; enlarging or shortening the time limit was discretionary with the judge under all the relevant facts and circumstances.

Title III largely tracks the probable cause and particularity of description requirements imposed by the Supreme Court in *Berger* v. *New York,* 388 U.S. 41 (1967) and *Katz* v. *United States,* 389 U.S. 347 (1967). The innovative element in Title III concerns the requirement in § 2516(1) that the Attorney General or his specially designated Assistant Attorney General approve wiretap applications prior to their submission to a judge. The intent of this requirement was to place the responsibility and accountability for the formulation of law enforcement policy by the use of electronic surveillance measures in a publicly responsible office subject to the political process. S. Rep. No. 1097, 1968 U.S. Code Cong. & Admin. News 2185, 2189. The Attorney General is to assure that the statutory wiretap authority available in Title III is used with restraint and not routinely invoked. *United States* v. *Giordano,* 416 U.S. 505, 515 (1974).

On this basis, Attorney General Mitchell properly approved the application for electronic surveillance authority on January 26, 1971. Both the Lindenbaum (PA 7) and Criminal Division (PA 4) memos of January 26, 1971 indicated to Mitchell that a major narcotics conspiracy extending to Virginia, Massachusetts, and the District of

Columbia as well as the metropolitan New York area was involved. The Lindenbaum memo also indicated that the BNDD had set up a special unit to handle the investigation due to the problem of Bynum's possible corruption of BNDD agents, as well as New York City police and district court officials. The fact that a major narcotics distribution conspiracy as well as likely bribery of public officials was involved amply supports the conclusion that resort to Title III was neither routinely invoked by the BNDD nor routinely approved by Mitchell personally on January 26, 1971.

The statute does not call for this same personal review function by the Attorney General prior to a request to the Court for further time to conduct the interception previously approved. There is no logical reason for requiring such personal review when the question is merely *how long the wiretap should last.* Whether there should be a wiretap is the function that Congress placed in the hands of the Attorney General—to be performed personally. The *time limit* is keyed to probable cause—a function of judicial review—not to authorization by the Attorney General. The governing provision on extensions, § 2518(5) simply indicates that an application to grant additional time for an authorized interception must comply with requirements set forth in 18 U.S.C. § 2518(1) which merely requires in the connection under discussion that the papers should name the authorizing official. Here the official who authorized the interception was Mitchell and the papers so stated. There is no requirement apart from the initial approval of wire interception, for personal authorization by the Attorney General of time limit adjustments. Section 2516 itself which places responsibility on the Attorney General makes no reference to adjustment of the time limit of the authorization or to extension applications other than to

refer the reader to section 2518 for the outermost periods for interception of 30 and 30 days and to the Judge for the grant of an extension of time within those limits.

Once the interception of wire communications has been initially authorized, the crucial element in assessing whether and how long the interception should continue is that of probable cause. Determinations of whether or not probable cause exists are the particular province of the judge or magistrate, and the Attorney General's conclusions as to whether or not there is probable cause in the history of the tape to date and in the request for more time is in no way binding upon the judge, nor would the Attorney General's conclusions thereon permit a judge to determine that probable cause exists without reviewing the underlying affidavits of the investigating field agents. *See United States* v. *Chavez,* 416 U.S. 562, 574 n.5 (1974). Thus an individual is protected, from the granting of an abusive continuance or extension of the time limit given in an originally valid intercept order, by the judge's review of the element of continuing probable cause.

Although not required to do so, pursuant to his discretionary authority under 18 U.S.C. § 2518(6), Judge Travia incorporated a provision in his January 29, 1971 order which required AUSA Updike to file reports on the progress of the wiretap on the fifth, tenth, and fifteenth days following entry of the order. Updike submitted three such reports by letters dated February 4, 1971 (H 635), February 8, 1971 (H 637), and February 16, 1971 (H 677). AUSA Updike also communicated information orally to Judge Travia on the progress of the wiretap. At the time when Judge Travia made his updated findings of probable cause with respect to the original phone on the premises on February 18, 1971, he had before him the affidavit of Agent Taylor which summarized the more significant nar-

cotics related calls intercepted during the period January 30 to February 18, 1971. Judge Travia's February 18, 1971 time extension contained a similar provision with respect to the filing of interim reports on the progress of the wiretap. During the period January 30 to March 3, 1971, AUSA Updike forwarded copies of the intercept logs on a regular basis to Judge Travia at his request.

Thus both Attorney General Mitchell and Judge Travia properly performed their statutorily mandated review functions in this case, Mitchell in approving the initial application for wiretap authority in advance of Court submission thereof in a case clearly justifying its use and Judge Travia by controlling the time limits and periodically reviewing the progress of the wiretap and the continued presence of probable cause under both his January 29 and February 18, 1971 orders.

II.

As an alternative basis which sustains the regularity of the interceptions complained of herein, this Court finds that Attorney General Mitchell's personal approval on February 11, 1971 of the application about to be submitted to Judge Travia authorized whatever further applications to the Court that might be deemed necessary for authority to intercept communications during the period February 12, 1971 to March 3, 1971 over the private residential telephone service subscribed for in the name of Fred Garnett. Thus application for the February 18, 1971 order extending the time for the interception of communications over phone facility (212) 342-6203, which was originally provided by the January 29, 1971 order, was personally approved by the Attorney General on February 11, 1971, and the action taken by his Executive Assistant on February 18, 1971, was both unnecessary and irrelevant to the issue of the Attorney General's personal authorization in this case.

This conclusion is based on four propositions. *First,* since the two telephone facilities were both located in the same premises, both calling for residential service, subscribed for in the same name, and used by the same persons for the same criminal purposes, they were in effect a single or common unit. *Second,* the government officials in the field intended to establish a tandem tap by which interception of wire communications over both telephone facilities would proceed and terminate concurrently. *Third,* the references to phone number (212) 346-5992 in the supporting papers and in Mitchell's February 11, 1971 memo to Will Wilson may be treated as unnecessary surplusage or irrelevant omission of the other number when read, as they must be, in conjunction with Mitchell's January 26, 1971 approval of the application for the January 29, 1971 order, as well as their supporting papers. The February 11, 1971 objectives approved by Mitchell thus authorized applications for authority to intercept within the statutory time limits all communications on the residential telephone service subscribed for by Fred Garnett which was provided for 855 Linden Boulevard. Application for the February 18, 1971 order to adjust the time limit on interceptions was thus embraced within the personal approval by Mitchell on February 11, 1971. *Fourth,* read together, Title III and the Fourth Amendment impose three basic requirements: (1) approval of all wiretap interception by a Justice Department official responsible to the political process order to action by a federal judge, (2) findings of probable cause and necessity made by the judge, and (3) a Court order which is sufficiently specific in terms of the persons, crimes, places, method and time frame involved in order to prevent a general or exploratory search. Construing Attorney General Mitchell's February 11, 1971 action to authorize the announced intention by the government on February 18, 1971 to align the time frames of the interceptions, does

not violate any of these requirements, nor are they violated by the February 18, 1971 order itself.

1. Single unit involved

As of January 14, 1971 when the government agents were preparing the application for the initial order their check of the records of the New York Bell Telephone Company revealed that private residential telephone service was installed to 855 Linden Boulevard, Brooklyn, which had been subscribed for by Fred Garnett and to which the company had assigned the listing (212) 342-6203. (Taylor Affidavits, January 28, 1971, para. 18, H 617, H 624; February 12, 1971, para. 8 (H 652, H 654). This information appeared in the application presented to and authorized by Attorney General John Mitchell on January 26th and was reflected in the wiretap order issued by Judge Travia on January 29th, 1971.

Apparently, as will shortly be indicated, Bynum learned of the pendency of the wiretap application and that an interception order would be issued thereon. On January 26th an oral request was made to the telephone company for the installation of additional residential service to 855 Linden Boulevard for the same subscriber, Fred Garnett, with the request for an unlisted number assigned thereto. The additional service was installed on January 28th with the assigned number (212) 346-5992. (Taylor Affidavit, February 12, 1971, para. 10, H 652, H 655). The existence of the second phone facility was indicated to the government agents on January 30th when two intercepted conversations on the first line referred to a second phone "downstairs". (Taylor Affidavit, February 12, 1971, paras. 9, 11; H 652, H 654-55). Thereafter, 10 phone calls intercepted on the original line indicated the existence of the second line and Judge Travia was notified on February

4th that narcotics related phone calls were being diverted from the first to the second line into the premises (Taylor Affidavit, February 12, 1971, para. 11; H 652, H 655-56, Letter of AUSA Updike to Judge Travia, February 4, 1971; H 635, H 636).

Bynum testified at the trial that he had learned in advance of the January 29th order that the phone into 855 Linden Boulevard, (212) 342-6203 would be tapped; this tip-off came from an employee inside the telephone company who was a friend of defendant Mae Garnett, one of the co-conspirators. (Bynum Cross-Examination, A 2124-26; Redirect A 2199-2200). It is a fair inference from the evidence and all the facts and circumstances herein and the Court finds that Bynum knew that a wiretap application had been presented by the government and that an order would be or had been issued to monitor his narcotic activities at 855 Linden Boulevard and that he caused the installation of the additional phone service to conceal those activities and to frustrate their interception and disclosure on the original line.

In this context, this Court finds as a fact that the two lines were in effect a single or common unit, essentially analogous to an extension telephone installed on the same wire with the same number, but located in a different room within the premises. *See Steele* v. *United States No. 1*, 267 U.S. 498 (1925) (warrant with description of garage for business purposes at No. 611 permitted search of No. 609 as well where both entrances were in the same building, there was no physical division of the building in half, and there was no division of the building in terms of use); *United States* v. *Melancon*, 462 F.2d 82 (5th Cir.), *cert. denied*, 409 U.S. 1038 (1972) (search warrant for No. 623 authorized search of 622 where both parcels were owned by the defendant, there was a clear path between them, and

building described in warrant was located on parcel 622); *United States* v. *Evans*, 320 F.2d 482 (6th Cir. 1963) (two family building: search warrant for No. 1000 half of the building permitted search of the attic in No. 1004 half of the building where only access to attic was by door cut through No. 1000 attic, access from No. 1004 having been permanently blocked off); *Rodriguez* v. *State*, 297 So.2d 15, 21 (Fla. 1974) (dictum) (three separately authorized taps on three phones in the same home each listed in the name of a different resident might be considered to be a single tap, but in any event requisite minimization effort not shown). *See generally People* v. *Ward*, 508 P.2d 1257, 1259 (Colo. 1973) (two separate warrants for two separate addresses in the same building issued on basis of affidavit showing common occupancy with probable cause not specifically referable to either address).

2. Tandem eavesdropping involved

Similarly, the fact is that once the existence of the second telephone line was discovered the government intended to establish a tandem tap on the two lines so that interception of communications over both lines would proceed and terminate simultaneously. The government's original surveillance plan, duly approved and authorized by the Attorney General and the Court, contemplated tandem eavesdropping by means of an oral bug to be installed at 855 Linden Boulevard in conjunction with a wiretap on what was then believed to be the only line into the premises. Use of such a tandem eavesdrop was expected to facilitate piercing what otherwise might appear to be innocent telephone conversations due to the use of code words. 360 F. Supp. at 405.

The initial time limit for both the wiretap and the oral bug under the January 29, 1971 order was the same—20

days. Under the February 12, 1971 order, the time limit for the wiretap on the second line was again similar—20 days from the date of the second order. The interception objectives as well as the wording of both the January 29, 1971 and February 12, 1971 orders were identical. (See Updike Affidavit, February 18, 1971, para. 7, H 686, 688-89). AUSA Updike's February 16, 1971 report to Judge Travia (H 676) indicated that an application was then being processed for an extension of the tap on the first line so that intercept authority for both lines would terminate on the same date. Thus throughout the period January 29, 1971 to March 3, 1971, the government's intent to simultaneously intercept and ultimately cease to intercept communications over both telephone lines is clear. The BNDD agents, as well as the Justice Department, were well aware of the interrelationship between the two lines and out of excessive caution believed that interception authority for both lines should be formalized and aligned. (*See, e.g.*, Taylor Affidavit, February 18, 1971, para. 11, H 692, 698; Criminal Division Memo, February 18, 1971, PA 6). In this context, a tandem wiretap was thus the only sensible way to proceed.

3. Mitchell's February 11, 1971 approval covered both listings.

Attorney General Mitchell's February 11, 1971 memo to Will Wilson (A 122) indicating his approval of the application to be made to Judge Travia specifically mentions interception of oral communications (bug) and of wire communications into and out of a private residence at 855 Linden Boulevard in Brooklyn and gives the phone listing as (212) 346-5992. However, since this Court has concluded that the two telephone listings involved in this case may be treated as a single or common unit and that the government intended throughout the investigation to

maintain tandem eavesdropping, the specific reference to telephone listing (212) 346-5992 in the memo cited above may be treated as unnecessary surplusage or merely immaterial omission of the other number for like phone service. *See, e.g., Nofs* v. *State,* 295 So.2d 308, 309 (Fla. App. 2d Dist. 1974) (warrant identifying "western-most apartment on the second story" of building authorized search of the entire apartment which turned out to be a duplex); *United States* v. *Contee,* 170 F. Supp. 26 (D.D.C. 1959) (warrant specified "premises 810 C St. N.E. [entire Apt. A] Washington, D.C. occupied by X" permitted search of X's apartment even though there was no "A" label on the door). *See generally United States* v. *James,* 494 F.2d 1007 (D.C. Cir. 1974), *appeal pending,* (with respect to determination of probable cause, agent's affidavit must be read in a common sense and realistic fashion). The remaining information concerning the means of interception, the location of the premises, and the persons and crimes involved sufficiently makes clear the scope of the application authority approved by Mitchell to be exercised by AUSA Updike and the BNDD. Application for the February 18, 1971 order was within the scope of that approval.

4. The purposes of Title III and the Fourth Amendment were safeguarded.

Title III of the Omnibus Control and Safe Streets Act of 1968 was enacted following the Supreme Court's decisions in *Berger* v. *New York,* 388 U.S. 41 (1967) (New York wiretapping statute unconstitutional) and *Katz* v. *United States,* 389 U.S. 347 (1967) (warrant issued by a magistrate on a finding of probable cause required), which had both stricken down the authority for electronic surveillance asserted in those cases. Congress was concerned with two potentially conflicting objectives: protecting personal privacy from the threat of invasion by increasingly

sophisticated electronic eavesdropping devices while delineating constitutionally adequate procedures for employing such admittedly effective devices in combatting organized crime. *United States* v. *Kahn,* 415 U.S. 143, 151 (1974).

The constitutional warrant requirement provides two basic protections. First, based on the premise that any intrusion at all is an evil and that an element of necessity is therefore required as justification, review by a magistrate is intended to eliminate all searches not based on probable cause. Second, based on the premise that even necessary searches should be as limited as possible, the "specificity" or "particularity" requirement is intended to avoid the evil of the general warrant and the exploratory search. *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971).

In the context of Title III, § 2518(3) which contains the probable cause requirements and § 2518(1) and (4) which list the descriptive elements which must be stated in the wiretap application and order, play the same role. As with the Fourth Amendment, specificity of person, time, place, method, and conversations to be "seized" is not a desideratum in itself, but rather only insofar as it protects persons from improper government intrusion. Just as the Fourth Amendment prohibits the general warrant abhorred by the colonists, Title III prohibits the "strategic intelligence surveillance" feared in our times. *See United States* v. *Tortorello,* 480 F.2d 764, 779 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973). Like the Fourth Amendment, Title III protects people not places.

Title III also added a significant safeguard of non-constitutional origin. Approval of all wiretap applications by the Attorney General or an Assistant Attorney General specially designated by the Attorney General for

that purpose is required by § 2516(1) prior to submission of the applications to a judge. Section 2516(1) is intended to place the responsibility for the formulation of law enforcement policy on the use at the federal level of electronic surveillance in a publicly responsible office subject to the political process. Its companion provision, § 2518(1)(a) which requires that the application identify the official who has authorized interception of phone conversations, facilitates accountability should abuses occur. S. Rep. No. 1097, 1968 U.S. Code Cong. & Admin. News 2185, 2189.

Section 2516(1), however, does not enumerate specific findings that the Attorney General must make in fulfilling his responsibility as opposed to § 2518 which enumerates the specific probable cause findings that a judge must make before issuing or extending the viable period of a wiretap order. It is clear that the Attorney General is not intended to simply append to the application his conclusion as to probable cause. It is the evidence from the investigating agents that the judge's determination of probable cause must rest upon, not the conclusions of the Attorney General. *See United States* v. *Chavez,* 416 U.S. 562, 574 n.5 (1974). Rather the crucial function of review performed by the Attorney General is to assure that the statutory wiretap authority conferred by Title III will be used with restraint and will not be routinely invoked. *United States* v. *Giordano,* 416 U.S. 505, 515 (1974). Proper exercise of this review responsibility necessarily contemplates situations where the Attorney General would conclude that wiretapping would be improper even though a judge could properly find probable cause for granting intercept authority. *Id.,* at 527-28.

In light of all the circumstances, this Court concludes that the Attorney General's statutorily mandated review function of assuring that the use of electronic surveillance

was justified in this case was properly fulfilled when he personally considered and authorized wiretap interception of conversations on the residential phone service at 855 Linden Boulevard.

There can be no question that the constitutional requirements were amply satisfied by the proof of probable cause and sufficiency of the warrant (in this case Judge Travia's orders). While Courts have applied the probable cause requirement in a stringent fashion, with respect to the particularity requirement, a test of "practical accuracy rather than technical nicety" has been considered sufficient protection for personal rights. *United States* v. *Gomez,* 42 F.R.D. 347 (S.D.N.Y. 1967). The underlying test is whether, given the specificity of the warrant, a violation of personal rights was likely, either through a general search directed toward the intended person or a search incorrectly directed toward a different and presumptively innocent person. *See United States* v. *Melancon,* 462 F.2d 82, 94 (5th Cir.), *cert. denied,* 409 U.S. 1038 (1972); *Gomez, supra.* Thus variations between the description in the warrant and the search actually conducted and the materials actually seized does not necessarily render the search and seizure invalid and require suppression.

The Fourth Amendment case law establishes that mistakes in numbering assume constitutional significance only when there is a danger that the privacy rights of third parties will be threatened or there is a danger of a general search. *Compare United States* v. *Kaye,* 432 F.2d 647 (D.C. Cir. 1970) (search warrant to search No. 3618, a *business,* did not authorize search of 3618½, a second floor *residence* with separate entrance but part of same building leased in its entirety to defendant) *with United States* v. *Melancon,* 462 F.2d 82 (5th Cir.), *cert. denied,* 409 U.S. 1038 (1972) (search warrant for No. 623 authorized search

of 622 when both parcels were owned by defendant, there was a clear path between them, and building described was on 622). The same principle is applied when the search warrant description actually covers only a part of the area to be searched, *Steele* v. *United States No. 1,* 267 U.S. 498 (1925) (warrant with description garage for business purposes at No. 611 permitted search of No. 609 as well where both entrances were in the same building, there was no physical division of the building in half, and there was no division of the building in terms of use), and the knowledge of the enforcement agents may clarify an otherwise ambiguous warrant. *United States* v. *Gomez,* 42 F.R.D. 347 (S.D.N.Y. 1967) (failure to specify which basement apartment of several located at specified address not fatal since agents knew which apartment they had observed).

The same approach governs with respect to the omission of information. While it is not the best practice to do so, omission from the warrant of the name of the owner of the premises involved does not necessarily render the search invalid if the premises are otherwise adequately described. *E.g., United States* v. *Fitzmaurice,* 45 F.2d 133 (2d Cir. 1930); *United States* v. *Kahn,* 415 U.S. 143, 155 n.15 (1974) (dictum). Similarly the warrant need not state the name of the owner of a vehicle to be searched, although it is desirable to do so. *Wangrow* v. *United States,* 399 F.2d 106, 114-15 (8th Cir.), *cert. denied,* 393 U.S. 933 (1968); E. Mascolo, *Specificity Requirements for Warrants Under the Fourth Amendment: Defining the Zone of Privacy,* 73 Dick. L. Rev. 1, 29 (1968). In the present case, while it would be desirable to have had both telephone listings specified, an omission of one of the two does not raise the spectre of either a general or exploratory search or the invasion of the privacy of an innocent third party since each of the other descriptive elements is set forth in the order with sufficient specificity to remove any

discretion on the part of BNDD agents in implementing the taps on both phones.

Nor does the statute itself *require* that either the application or the order shall give the particular phone listings as long as other specific and unmistakable identifying information is provided of the manner and object of the search. Section 2518(1)(b)(ii) provides that the application shall include "a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted." Section 2518(4)(b) provides that the order shall specify "the nature and location of the communication facilities as to which, or the place where, authority to intercept is granted.[5] To be sure, the particular telephone numbers are necessary as a mechanical matter to hook into the conversation to be intercepted, but translation of the information concerning the listed name and address into two telephone company service numbers by telephone company employees and BNDD officials was simply an incidental ministerial act.[6]

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[5] S. Rep. No. 1097 indicates that the application shall state "the place where, or the facilities or phone from which the communication is to be intercepted", 1968 U.S. Code Cong. & Admin. News 2190, and that the order is required to specify "the phone or other communication facilities from which or the place where the authority to intercept is granted." *Id.* at 2191-92. The phone in this case was Garnett's phone and the place was 855 Linden Boulevard in Brooklyn, while the users were Bynum and his co-conspirators.

[6] Section 2518(4) provides in part:

> An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a

[Footnote continued on following page]

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APPENDIX I—Opinion and Findings of District Court 360 F. Supp. 400 (December 5, 1974)

Upon reconsideration of all the facts and circumstances and bearing in mind the teachings of *Giordano* and *Chavez*, this Court concludes and accordingly reports to the Court of Appeals, Second Circuit, that suppression of the intercepted communications and their investigative fruits is not required in this case.

The foregoing shall constitute the findings and conclusions required by Fed. R. Civ. P. 52(a).

So Ordered.

December 5, 1974

Milton Pollack
U.S. District Judge

(Footnote continued from preceding page)

minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

One of the BNDD informants who had been inside the premises at 855 Linden Boulevard indicated that the phone located there was being used for narcotics related communications, but did not know what the telephone number was. (Taylor Affidavit, January 28, 1971, para. 21, H617, H625). Surely a wiretap order issued on this basis with the actual listing subsequently supplied by the telephone company at the time of implementation would be valid.

APPENDIX J

Third Opinion of the Court of Appeals — F.2d — (March 26, 1975)

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 730—September Term, 1974.

(Submitted March 17, 1975 Decided March 26, 1975.)

Docket Nos. 72-1857, 72-1884, 72-2101, 72-1763, 72-1242, 72-2143

United States of America,

Appellee,

v.

Elvin Lee Bynum, Joseph Cordovano, Abraham Wright, Lance Small, Newbry Mitchell, Fannie Mae Garnett, Jacqueline Fuller Dyson, John Coniglio, Angelo Mele, Vincent Altamura, Irving Birnbaum, John Feroldi, Charles Tuzzolino and Levis Nedd,

Appellants.

Before:

Kaufman, *Chief Judge,*

Smith and Mulligan, *Circuit Judges.*

Elvin Lee Bynum et al. appeal from a determination by the United States District Court for the Southern District of New York, Milton Pollack, *Judge,* pursuant to a remand order from this court, that the introduction of wiretap evidence at their trial does not require reversal in light of *United States* v. *Giordano,* 416 U.S. 505 (1974), and *United States* v. *Chavez,* 416 U.S. 562 (1974).

Affirmed.

Henry J. Boitel, New York City, *for appellant Bynum.*

PATRICK M. WALL, New York City, *for appellants Cordovano, Wright, Small, Mitchell, Garnett and Dyson.*

H. ELLIOT WALES, New York City, *for appellants Coniglio, Mele and Tuzzolino.*

FRANK LOPEZ, Brooklyn, N.Y., *for appellant Altamura.*

AMEDEO LAURITANO and JOEL WINOGRAD, New York City, *for appellant Feroldi.*

MORROW D. MUSHKIN, New York City, *for appellant Birnbaum.*

Appellant LEVIS NEDD, *pro se.*

PAUL J. CURRAN, U.S. Atty., Southern District of New York (W. Cullen MacDonald and Lawrence S. Feld, Asst. U.S. Attys., New York City, of counsel), *for appellee.*

KAUFMAN, *Chief Judge*:

The facts relevant to the convictions of these appellants, defendants in a far-ranging narcotics conspiracy, are set forth in *United States* v. *Bynum*, 485 F.2d 490 (2d Cir. 1973), and thus need not be repeated here.[1] Subsequent to its decisions in *United States* v. *Giordano*, 416 U.S. 505 (1974), and *United States* v. *Chavez*, 416 U.S. 562 (1974), the Supreme Court vacated the judgment of this

[1] *See also United States* v. *Bynum*, 475 F.2d 832 (2d Cir. 1973), *on remand, United States* v. *Bynum*, 360 F. Supp. 400 (S.D.N.Y. 1973).

court and remanded for further consideration in light of those cases. On June 18, 1974 we remanded to the district court for the appropriate reconsideration of the admissibility of wiretap interceptions introduced at trial, and after hearing evidence relevant to the procedures followed for authorization, Judge Pollack concluded that *Giordano* and *Chavez* did not require suppression. We affirm.

On this occasion, the appellants claim that Judge Travia's extension order permitting interceptions to continue over telephone number 212-342-6203 until March 3, 1971 was improperly authorized, since neither Attorney General Mitchell nor an Assistant specially designated by him approved the application. We note at the outset that appellants Abraham Wright, Lance Small, Newbry Mitchell, Jacqueline Fuller Dyson, John Coniglio, Angelo Mele, Vincent Altamura, Irving Birnbaum, John Feroldi, Charles Tuzzolino, and Levis Nedd did not participate in the four "extension" conversations here in dispute, nor did any of them have an interest in the premises at 855 Linden Blvd. They are, consequently, not "aggrieved persons" within the meaning of 18 U.S.C. §§ 2510 (11) and 2518 (10) (a), and have no standing to contest the admission of the evidence at their trial. *United States* v. *Capra*, 501 F.2d 267, 281 (2d Cir. 1974); *United States* v. *Garcilaso de la Vega*, 489 F.2d 761, 763 (2d Cir. 1974); 1968 U.S. Code Cong. & Admin. News 2185.

Fannie Mae Garnett, as a resident at 855 Linden, would obviously have standing to object to introduction of the four conversations if they provided evidence against her. But none of the calls referred to her directly or indirectly, and it was never claimed that they constituted proof of her participation in the conspiracy. Thus any error as to Garnett was harmless.

Although we agree with Bynum's and Cordovano's contention that 18 U.S.C. § 2518 (5) contemplates an authorization procedure for extensions similar to that required for initial applications,[2] we conclude that the contents of the four extension recordings introduced were merely cumulative as to them. Little was added to the Government's case against Cordovano by the introduction of calls ##2312 and 2463 (Govt. Exhibits 75, 85) in which he participated. Both George Stewart and Charles Moody testified about direct narcotics dealings with Cordovano. Moreover, he was arrested in possession of cocaine, and a sub-machine gun described by Moody as belonging to him was found in a neighbor's house. Finally, the recordings of ten other telephone conversations in which he participated between February 20 and March 6, 1971, all properly intercepted, provided both additional evidence and corroboration of Stewart's testimony. It is clear to

[2] 18 U.S.C. § 2516(1), for example, provides that the Attorney General may authorize an interception order "when such interception may provide *or has provided* evidence of [specified crimes]." [Emphasis added.] It is difficult to understand what the phrase "has provided evidence" refers to, unless it be that the phone for which a tap is requested has already been the subject of surveillance.

Moreover, § 2518(5) provides that

> Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section.

Subsection (1) of § 2518 states that each application shall include

> (a) the identity of . . . the officer authorizing the application . . . .

Section 2516, however, makes clear that the only officers who can authorize applications are the Attorney General or an Assistant specially designated by him.

us from "our own reading of the record and . . . what seems to us to have been the probable impact . . . on the minds of an average jury," *Harrington* v. *California*, 395 U.S. 250, 254 (1969), that admission of the extension interceptions against Cordovano was at most harmless error. *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Schneble* v. *Florida*, 405 U.S. 427 (1972).

We reach a similar conclusion as to Bynum. Stewart not only testified about his own numerous dealings with Bynum, but provided a sample of cut cocaine received from Bynum on January 10, 1971, and the $65,000 in cash delivered to him at Bynum's request on February 25, 1971. Moody testified concerning Bynum's part in planning the aborted Washington, D.C. robbery. And Bynum himself admitted having been at the places where he had been observed by agents Theodore Handoga and Richard Moser. Finally, an examination of the calls themselves shows that their direct evidentiary and corroborative value was at best minimal.

Affirmed.

APPENDIX K
Amended Order of the Court of Appeals Denying Rehearing (April 25, 1975)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 72-1857

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of April, one thousand nine hundred and seventy-five. Present:

HON. IRVING R. KAUFMAN, *Chief Judge*

HON. J. JOSEPH SMITH,
HON. WILLIAM H. MULLIGAN, *Circuit Judges.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

ELVIN LEE BYNUM, a/k/a Al, a/k/a Big Al, JOSEPH CORDOVANO, a/k/a Joey, Joe Carr, Joe the Butcher, ABRAHAM WRIGHT, LANCE SMALL, NEWBRY MITCHELL, LILLIAN EVERETT BYNUM, a/k/a "Chink", FANNIE MAE GARNETT, a/k/a Mae, JACQUELINE FULLER DYSON, a/k/a Jackie, JOHN CONIGLIO, a/k/a Giggsy, Angelo Meli, VINCENT ALTAMURA a/k/a Vinnie, "V", STANLEY SHERMAN, IRVING BIRNBAUM, CHARLES MOODY, JOHN FEROLDI, CHARLES TUZZOLINO, a/k/a Mr. Brooks, Levis Nedd, MICHAEL LEBBERS, a/k/a Mike the Irishman,

Defendants.

APPENDIX K—Amended Order of the Court of Appeals Denying Rehearing (April 25, 1975)

ELVIN LEE BYNUM, a/k/a Al, a/k/a Big Al, JOSEPH CORDOVANO, ABRAHAM WRIGHT, LANCE SMALL, NEWBRY MITCHELL, FANNIE MAE GARNETT, a/k/a Mae, JACQUELINE FULLER, DYSON a/k/a Jackie, JOHN CONIGLIO, a/k/a Giggsy, ANGELO MELI, VINCENT ALTAMURA, a/k/a Vinnie, "V", IRVING BIRNBAUM, JOHN FEROLDI, CHARLES TUZZOLINO, a/k/a Mr. Brooks Levis Nedd,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants, Elvin L. Bynum, Joseph Cordovano, Abraham Wright, Lance Small, Newbry Mitchell, Jacqueline Fuller, Dyson, Levis Nedd, Fannie Mae Garnett, Charles Tuzzolino, Angelo Meli, John Coniglio, Irving Birnbaum,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

By: /s/ A. DANIEL FUSARO

A. DANIEL FUSARO,
Clerk

Supreme Court, U. S.
FILED
AUG 28 1975
MICHAEL RODAK, JR., CLERK

Nos. 74-1445 and 74-6411

In the Supreme Court of the United States

OCTOBER TERM, 1975

ELVIN LEE BYNUM, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

IRVING BIRNBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1445

ELVIN LEE BYNUM, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 74-6411

IRVING BIRNBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals' first opinion in this case, remanding to the district court, is reported at 475 F. 2d 832 (Pet. App. A). The district court's findings and opinion on remand are reported at 360 F. Supp. 400 (Pet. App. B). The next opinion of the court of appeals, affirming petitioners' convictions, is reported at 485 F. 2d 490 (Pet. App. C). The memorandum decision of this Court vacating the judgments of con-

viction and remanding to the court of appeals is reported at 417 U.S. 903 (Pet. App. G).

The court of appeals in turn remanded again to the district court (Pet. App. H). The district court's subsequent findings and opinion are reported at 386 F. Supp. 449 (Pet. App. I). The opinion of the court of appeals again affirming petitioners' convictions is reported at 513 F. 2d 533 (Pet. App. J).

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1975. A petition for rehearing was denied on April 25, 1975 (Pet. App. K). The petition for a writ of certiorari in No. 74–6411 was filed on April 25, 1975.[1] The petition in No. 74–1445 was filed on May 16, 1975.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the wire interceptions involved in this case were unlawful because the government failed to

[1] Although petitioner Birnbaum filed a separate petition (No. 74–6411), he also joins in the petition filed on behalf of all other petitioners in this case (No. 74–1445). The separate petition filed by Birnbaum states certain issues presented for review without supporting argument, and apparently was filed only to insure compliance with the time requirements of Rule 22(2) of the Rules of this Court. Unless otherwise noted herein, reference to petitioners' arguments and corresponding portions of their petition refers to petition No. 74–1445.

[2] Inasmuch as petitioner Altamura apparently did not join in the petition for rehearing before the court of appeals (Pet. App. 143a), the petition for a writ of certiorari is untimely as to him under Rule 22(2) of the Rules of this Court.

demonstrate the inadequacy of other investigative procedures.

2. Whether the government failed to minimize the interception of irrelevant conversations.

3. Whether certain wire interceptions were improperly authorized by Justice Department officials.

STATEMENT

1. A three-count indictment returned in the United States District Court for the Southern District of New York on October 13, 1971, charged petitioners and four others with conspiring to obtain and sell narcotics in violation of 26 U.S.C. (1964 ed.) 4705(a) and 7237 (b) (Count I).[3] Petitioner Nedd was also charged with unlawfully carrying a firearm in the commission of the conspiracy, in violation of 18 U.S.C. 924 (Pet. App. 3a–4a; T. 17–22).[4] Following a jury trial, all petitioners were found guilty as charged.[5]

[3] Other defendants named in Count I of the indictment were Lillian Everett Bynum, Charles Moody, Michael Lebbers and John Feroldi. Lillian Bynum's trial was severed on motion of the government. Moody testified as a government witness at trial and later pleaded guilty to an information charging him with participation in the conspiracy in question. Lebbers' motion to dismiss the counts against him was granted by the court (Pet. App. 4a, n. 2). Feroldi's conviction on the conspiracy count was affirmed by the court below; he has not joined in the instant petition (Pet. 8, n. 3a).

[4] "Pet. App." refers to the appendix filed with petitioners' petition. "T." refers to petitioners' seven-volume appendix filed in the court below, and "H." refers to the four volumes of testimony and documents from the first evidentiary hearing conducted pursuant to the court of appeals' remand on the minimization issue. All of these volumes have been certified to the Court by petitioners (Pet. 2, n. 1).

[5] The sentences imposed on the various petitioners are set forth at Pet. App. 3a–4a, n. 1.

The evidence at trial is briefly set forth in the second opinion of the court of appeals (Pet. App. 52a–57a) and is not in dispute. In summary, the evidence showed that petitioners Bynum and Cordovano were the key figures in a conspiracy to obtain, process, and distribute large amounts of narcotic drugs that had been unlawfully imported into the United States. Bynum was the banker, and he and Cordovano supervised the supply, cutting, packaging and distribution of the drugs. Petitioners Wright, Small, Mitchell, Garnett, and Dyson were distributors; and petitioners Coniglio, Mele (or Meli), Altamura, Birnbaum, and Tuzzolino were the suppliers for the ring.

The evidence of this widespread conspiracy, which also included plans for robberies for the purpose of procuring drugs and planned murders of suspected informants, came chiefly from a government informant, Stewart. His testimony was corroborated by physical surveillance and by written transcripts and recordings of telephone conversations obtained through electronic surveillance on two telephones at the residence of petitioner Garnett, which was the "nerve center" of petitioners' "massive criminal operation" (Pet. App. 4a–5a, 17a).

2. There were three separate applications and orders involving these two telephones. On January 29, 1971, Judge Anthony J. Travia of the Eastern District of New York authorized electronic surveillance of one telephone (#212–342–6203) for the ensuing twenty days, or until February 17. Petitioner Bynum learned of the planned surveillance before it was initiated; intercepted conversations over that line indicated that

another telephone (#212–346–5992) had been installed on the premises, and that Bynum was directing his incoming calls to that line (Pet. App. 23a). The government thereupon applied for authorization to intercept communications over the new line, and on February 12, 1971, Judge Travia issued an order granting such authorization for a period of twenty days, or until March 3, 1971 (Pet. App. 23a, 115a).

The government then requested the court to extend its authorization for interception over the first line (which expired February 17) so that surveillance of both lines would continue until the termination date of the second authorization on March 3. On February 18, 1971, Judge Travia entered an order authorizing such an extension (Pet. App. 116a). Although the application for the extension, and the court order granting it, stated that former Assistant Attorney General Will Wilson had authorized the application, it was established that in fact the request for the extension order had been approved by Sol Lindenbaum, former Executive Assistant to the Attorney General.[6]

The government intercepted 1,974 conversations during the surveillance period (excluding 84 calls to information, weather, and similar services) (Pet. App. 39a–40a). The contents of fifteen of these conversations were introduced at trial (T. 3192–3227). Of these fifteen conversations, four were intercepted on

[6] The applications and Judge Travia's orders relating to the initial interceptions over each line also stated that the applications had been authorized by Wilson; as to these applications, however, it was later established that approval had actually come directly from former Attorney General Mitchell (Pet. App. 115a; T. 54, 58, 81, 84, 120–122).

telephone #202–342–6203 during the period authorized by the extension order (Pet. App. 139a).

3. On appeal petitioners argued, *inter alia,* that electronic surveillance of both telephones was conducted in a fashion that violated both the statutory mandate and the authorizing order's requirement for minimization of interception of innocent conversations (Pet. App. 6a). Retaining jurisdiction, the court of appeals remanded the case to the district court for an evidentiary hearing on this issue (475 F. 2d 832; Pet. App. A). Following that evidentiary hearing, the district court concluded that the obligation to minimize had been properly met (360 F. Supp. 400; Pet. App. B). The court of appeals then affirmed the convictions, upholding the district court's findings on the minimization question and, in addition, rejecting petitioners' claim that the evidence of the four conversations intercepted during the extension period should have been suppressed because the application for the court order had not been approved by the Attorney General or a specially designated Assistant Attorney General, as required by 18 U.S.C. 2516(1) (Pet. App. 66a, 91a) (485 F. 2d 490; Pet. App. C).

On May 28, 1974, this Court vacated petitioners' convictions and remanded the case to the court of appeals for further consideration in light of *United States* v. *Giordano,* 416 U.S. 505[1] (417 U.S. 903; Pet.

[1] In *Giordano*, the Court held an application authorized by the Executive Assistant to the Attorney General failed to comply with the requirements of 18 U.S.C. 2516(1) and that suppression of evidence obtained pursuant to an order based on such an improperly authorized application was required under the provisions of 18 U.S.C. 2515 and 2518(10)(a)(i) (Pet. App. 91a, 103a–104a).

App. G). The court of appeals, upon the government's motion, remanded the case to the district court for reconsideration in light of *Giordano* and of *United States* v. *Chavez,* 416 U.S. 562[2] (Pet. App. H).

At a hearing, the district court ruled that, notwithstanding that the Executive Assistant, rather than the Attorney General or a specially designated Assistant Attorney General, had authorized the application for the extension order, the particular facts of this case distinguished it from *Giordano,* and the interceptions over telephone #212–342–6203 during the extension period were lawful. The court held that this result could be reached on either of two grounds.

First, the district court held that the personal approval of the Attorney General was unnecessary in respect to applications for extensions: so long as the Attorney General had personally approved the initial application, compliance with the statutory scheme was established, since the duration of the interception was a matter committed primarily to the discretion of the judge who issued the initial order (Pet. App. 118a, 120a–124a).

The district court held in the alternative that, in any event, the peculiar facts of this case show that the Attorney General had in effect authorized the extension application, since the two lines were for all practical purposes a "single unit" and the Attorney Gen-

[2] The Court determined in *Chavez* that, where the Attorney General had personally approved an application for a court order authorizing electronic surveillance, the misidentification of the authorizing official as an Assistant Attorney General in the application and resulting court order did not warrant suppression of evidence seized pursuant to the court order.

eral had authorized the tap of the second line through the period covered by the extension of interceptions on the first line. In this regard the court pointed out that, upon learning of the second telephone, the government had intended, with the Attorney General's specific authorization, to monitor both telephones in tandem, and indeed had applied initially, again with the Attorney General's approval, for an order allowing them to place a recording device on the premises of 855 Linden Boulevard so that oral communications as well as wire communications might be overheard (Pet. App. 124a–129a).[9] On these facts the district court held that both statutory and constitutional standards had been met, and that, accordingly, suppression of the intercepted conversations and their investigative fruits was not required (Pet. App. 136a).

The court of appeals then affirmed petitioners' convictions (513 F. 2d 533; Pet. App. J), but on reasoning different from the district court's. It held, first, that all of the defendants other than Bynum, Cordovano, and Garnett lacked standing as "aggrieved persons" under 18 U.S.C. 2510(11) and 2518(10)(a) to contest the admissibility of the four conversations intercepted during the extension period. The court then ruled (Pet. App. 140a):

[9] The district court found that the Attorney General had also mentioned interceptions of oral communications in his February 11, 1971, authorization of the application for an order allowing wire interceptions over the second telephone (Pet. App. 129a).

The district court on January 29 authorized the placing of such a device on the premises, but the government decided it was too dangerous and abandoned the idea (Pet. App. 23a, n. 6).

> Although we agree with Bynum's and Cordovano's contention that 18 U.S.C. 2518(5) contemplates an authorization procedure for extensions similar to that required for initial applications, we conclude that the contents of the four extension recordings introduced were merely cumulative as to them.[10]

The court likewise found (Pet. App. 139a) that "any error as to Garnett" stemming from introduction of the four intercepted calls "was harmless."

ARGUMENT

1. Petitioners contend first that the applications failed to establish the necessity for a wire interception as required by 18 U.S.C. 2518(1)(c) (set forth at Pet. App. 96a), because the investigators had ample information on which to arrest Bynum, the main target of the interception, without relying on additional information that the interceptions might reveal (Pet. 10, 28–30). While we agree that the affidavits stated facts sufficient to constitute probable cause for the arrest of Bynum before the interceptions were authorized, this does not preclude issuance of the intercept order where, as here, the investigation was directed

[10] In a footnote the court pointed out (Pet. App. 140a, n. 2) that 18 U.S.C. 2516(1), providing that the Attorney General may authorize an interception order when an interception "may provide or has provided evidence" of specified crimes, appears to apply, *inter alia*, to authorizations in connection with previously conducted interceptions. The court also noted that Section 2518(5) incorporates the requirements of Subsections (1) and (3), which call for the identification of the authorizing officer, and that under Section 2516 only the Attorney General or an Assistant Attorney General specially designated by him may act as authorizing officers.

at discovering the identity of the other persons involved in a major, wide-spread conspiracy. *United States* v. *Armocida,* 515 F. 2d 29, 37–38 (C.A. 3), pending on petitions for writ of certiorari, Nos. 74–6683 and 74–6686; *United States* v. *Staino,* 358 F. Supp. 852, 857 (E.D. Pa.); see *Hoffa* v. *United States,* 385 U.S. 293, 310. Furthermore, the facts in the affidavits were largely based on information from informants and included sufficient reasons to believe that these informants would refuse to testify against Bynum, thereby further establishing the necessity for the wire interceptions (H. 627–629). *United States* v. *Leta,* 332 F. Supp. 1357, 1362 (M.D. Pa.).

2. Petitioners allege (Pet. 30–35) that the monitoring agents failed to minimize the interception of irrelevant, innocent conversations, thereby violating both the order authorizing the wiretaps and the statute requiring such minimization, 18 U.S.C. 2518 (5). Upon the initial remand of the case to the district court for an evidentiary hearing on this issue, Judge Pollack conducted an "exhaustive analysis" (Pet. App. 67a) of the testimony and documentary evidence adduced at that hearing and concluded that the agents' efforts at minimization in this case complied with all requirements. The evidence substantiating that conclusion shows that the information known to investigating officers at the outset of the interceptions was that Bynum was successfully operating a "far flung narcotics trade" centered in Brooklyn, New York, and reaching to Boston, Baltimore, Washington, Atlanta, and areas of Virginia (Pet. App. 15a–16a). Such a vast illicit organization involved numerous unknown co-conspirators and was believed to involve the aid and protection of local and federal law enforcement officers, as well as certain attorneys (Pet. App. 15a–16a).

In light of these facts, the government sought authorization to intercept a telephone in a residence occupied by Bynum with petitioner Garnett, and identified as the center of the operation (Pet. App. 17a). In considering a plan to minimize the interception of innocent conversations, Assistant United States Attorney Updike, who was supervising the investigation, was faced with the following considerations:

1. The premises involved were the nerve center of a massive criminal operation, and the telephone at that location would be heavily relied upon as a means of communication with co-conspirators, so that innocent conversations passing over the telephone would be minimal (H. 40–42, 302, 625–627; Pet. App. 17a–18a, 69a).
2. With a vast number of unknown conspirators involved, there would be difficult problems of speaker identification, as well as problems arising out of the dialect of members of the narcotics operation (H. 345–347).
3. Most illicit telephone conversations would appear innocent on their face, and their relevance would become apparent only upon consultation with informants or when corre-

lated with physical surveillance (H. 42–43, 344).[11]

4. Many otherwise innocent conversations would contain information concerning the whereabouts and activities of the co-conspirators, which would be a considerable aid to the physical surveillance part of the investigation (H. 111, 212–213).

Updike discussed the problem of minimization extensively with his colleagues, and consulted the relevant statute and the guidelines set forth in the Justice Department manual on wire interceptions (H. 36–39). The minimization requirement was also discussed by Updike, Bureau of Narcotics supervising agents Taylor and Bitzer, and Judge Travia at the time the initial application was made, and at numerous meetings thereafter (H. 409–410). Judge Travia agreed that it would be impossible at the outset to set specific rules for minimization in the unique circumstances of the case, and that the agents would have to use their discretion in minimizing the interception of innocent conversations to the greatest extent possible, consistent with the needs of the investigation (H. 412–414, 450–453).

Updike thereafter instructed the monitoring agents that all telephone calls would be monitored and recorded at the outset, "except communication they in

[11] The investigators knew petitioner might have corrupted law enforcement officials (Pet. App. 15a–16a, 31a); thus it was reasonable to suppose he would learn of the interceptons and that telephone conversations would be extremely guarded. Bynum in fact did learn of the planned surveillance before it was initiated (Pet. App. 23a).

their judgment felt was a privileged communication, and if they heard or intercepted communications that fell into that latter category, they were to call it to my attention" (H. 33, 39, 266).

As the monitoring progressed, Updike was kept informed of developments by Agents Taylor and Bitzer, who were directly supervising the monitoring agents (H. 216, 342–343, 362). In addition, he personally examined the logs of the conversations on a periodic basis (H. 175, 187–188). During the course of the interceptions, Updike reexamined his policy of total interception, based upon his examination of the logs and his discussions with the monitoring agents. He was aware that conversations of a babysitter named Donna had been intercepted, and that some of these conversations described activities of the conspirators which provided useful leads (H. 80–82). Although Updike gave "explicit consideration" to the possibility of terminating the interception of Donna's conversations, he decided in light of all the circumstances not to change his instructions (H. 82).[12]

Updike also became aware that some of petitioner Garnett's calls were innocent in nature, but he determined to continue total interception of her calls because Garnett was plainly deeply involved in the conspiracy, and there was a considerable likelihood that, at some time during an otherwise innocent conversation, she would say something which would be useful to the investigation, such as the identification

[12] One such circumstance was that Donna was originally suspected of being involved in the drug conspiracy (H. 1084–1085, 1811).

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of other persons involved in the ring (H. 197–198).

Concerning the Donna and Garnett conversations, Updike stated (H. 198):

> They [the monitoring agents] also had the discretion not to listen if they thought that it would not be productive to continue listening, and I felt that under all of the circumstances that that was adequate.

In that regard, Agent Pryal,[13] who was involved in the monitoring of the telephone calls, testified that after the monitoring agents had become familiar with the parties to Donna's calls, they "listened to part of the conversation, determined who the parties were from voices, et cetera, and then, when it became most probable that it was just kids talking, we would take the earphones off and leave the recorder on" (H. 402). Pryal estimated that approximately 10% of the total conversations were not monitored by the agents; all conversations were recorded (H. 393).[14]

Throughout the duration of the interceptions, Judge Travia was kept informed of the progress of the in-

[13] It was stipulated that the other monitoring agents, if called to testify, would testify in a manner similar to Agent Pryal (H. 485–486).

[14] It was Updike's decision that all conversations should be recorded, even though the monitoring agents might deem them irrelevant. He made this decision principally to insure that "there could be no accusations at a later time that the government had made selective recordings * * *," *i.e.*, that it had omitted exculpatory conversations (H. 167–168; Pet. App. 30a). The privacy of innocent parties was to be protected by the fact that the recordings were sealed and delivered to the custody of the supervising judge (H. 42; Pet. App. 20a, 30a–31a, 33a). The conversations that the agents did not monitor were never overheard by anyone until the tapes were played by the parties in

vestigation through written and oral reports.[15] The written reports contained information concerning the number of calls intercepted, the number of relevant calls, and specific information learned from certain calls. In addition, each report contained the intercept logs for the period covered by the report (Pet. App. 36a–37a; H. 635–638, 677–680, 718–720, 722–726).

The interception lasted 34 days on one phone and 14 days on the other, and a total of 2,058 calls were recorded by the monitoring agents.[16] Only 501 calls lasted more than three minutes.[17] Of these, approximately 71 involved Donna talking with a party who was not a suspected conspirator (Pet. App. 39a–40a). It is obvious from Agent Pryal's testimony that the 10% of the conversations which were unmonitored included a great many of Donna's (H. 393, 399, 400–401). Although we agree with the district court that statistical analyses must be considered with caution (Pet. App. 38a), the above data, which are not in dispute (Pet. 25), show that the agents did in fact

the case during the hearing on minimization. The merits of such a policy of recording all conversations were recognized in *United States* v. *Manfredi*, 488 F. 2d 588, 600, n. 9 (C.A. 2), certiorari denied, 417 U.S. 936.

[15] Although the authorizing orders called for reports to be submitted to Judge Travia at five-day intervals, the oral reports were more frequent (H. 408).

[16] 84 of these calls were to information, weather, and similar services.

[17] Petitioners agree with the district court that calls of very brief duration must be monitored *in toto*, since it takes the monitoring agents some time to identify the parties and determine the nature of the conversation (Pet. App. 39a–40a; Pet. 23). See *United States* v. *Armocida*, *supra*, 515 F. 2d at 45.

succeed in effectively minimizing the monitoring of Donna's calls.

Petitioners also assert that the interception of calls involving petitioner Garnett to which no other conspirator was a party constituted an abuse of the minimization requirement (Pet. 24–25). In view of the fact that Garnett's involvement in the conspiracy was known to the agents, the monitoring agents acted reasonably in monitoring nearly all of Garnett's conversations.[18]

Courts that have dealt with the minimization question have recognized the particular problem involved where, as here, the object of the interception is to uncover information concerning large-scale conspiracies involving numerous unknown co-conspirators. See *United States* v. *Armocida, supra,* 515 F. 2d at 44, 45; *United States* v. *Cox,* 462 F. 2d 1293, 1300–1301 (C.A. 8), certiorari denied, 417 U.S. 918; *United States* v. *LaGorga,* 336 F. Supp. 190, 195–197 (W.D. Pa.); *United States* v. *Manfredi, supra,* 488 F. 2d at 599–600. In a case such as this, it is impossible for the supervising judge to give "detailed screening instructions which could effectively minimize licit telephone interceptions," *United States* v. *Manfredi, supra,* 488 F. 2d at 600, and the giving of general instructions is sufficient to comply with the mandate of 18 U.S.C. 2518(5). *United States* v. *Fino,* 478 F. 2d 35, 37 (C.A. 2), certiorari denied, 417 U.S. 918.

[18] Pryal testified that he had on occasion ceased monitoring Garnett's conversations (H. 350); presumably other agents did the same.

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The statute does not proscribe the interception of all nonpertinent calls, and there is no failure to minimize simply because, in retrospect, it appears that a substantial portion of the intercepted calls had no evidentiary or investigative value. *United States* v. *Scott,* 516 F. 2d 751 (C.A.D.C.); *United States* v. *James,* 494 F. 2d 1007 (C.A.D.C.), certiorari denied *sub nom. Jackson* v. *United States,* 419 U.S. 1020; *United States* v. *Cox, supra,* 462 F. 2d at 1300–1301; *United States* v. *Lanza,* 349 F. Supp. 929 (M.D. Fla.); *United States* v. *Curreri,* 363 F. Supp. 430, 437 (D. Md.).

In light of the circumstances of this case, where a vast, highly sophisticated narcotics conspiracy was under investigation that involved numerous unknown conspirators, where the supervising judge was kept intimately informed of the manner in which the interceptions were being executed by supervisory personnel, and where both the agents and the judge gave careful attention to the question of minimization, the court of appeals was correct in concluding (Pet. App. 73a) that the requirements of 18 U.S.C. 2518(5) were met.[19]

3. Petitioners' final contention (Pet. 38–44) is that

[19] Petitioners argue that even if the agents' efforts at minimization complied with statutory requirements, the interception in this case was the type of general search prohibited by the Fourth Amendment (Pet. 42–44). This argument is insubstantial, in light of the many decisions that have upheld the validity of 18 U.S.C. 2510–2520 against challenges that the statute permits an unconstitutionally broad general search. See, *e.g., United States* v. *Best,* 363 F. Supp. 11, 15, n. 3 (S.D. Ga.), and cases cited therein. See also *United States* v. *Kahn,* 415 U.S. 143, 151.

the court of appeals, assuming that the extension was improperly authorized, erred in ruling that the admission of four conversations intercepted during that period was harmless error (Pet. App. 139a–141a). In this regard, petitioners also challenge the court's ruling (*id.* at 139a) that all petitioners other than Garnett, Bynum, and Cordovano lack standing to contest the interceptions (Pet. 44–47).

In our view, the court of appeals' rulings in these respects were correct, although, as we point out below, these issues need not be reached because the interceptions during the extension period were lawfully conducted.

As to standing, petitioners would have the Court believe that each of them can establish entitlement to object to the extension interceptions as an "aggrieved person" within the meaning of 18 U.S.C. 2510(11) and 2518(10)(a). But petitioners Coniglio, Meli, Altamura, Birnbaum, and Tuzzolino were never overheard on either telephone at any time, and can demonstrate no interest in the property at 855 Linden Boulevard. Accordingly, they have no standing to complain of the interceptions. *Alderman* v. *United States,* 394 U.S. 165.

Similarly, as to the four extension period conversations introduced at trial, the remaining petitioners, except Garnett, the owner of the premises, and Bynum and Cordovano, the conversants, have no standing. *Alderman* v. *United States, supra.*[20]

[20] Cordovano's and Bynum's participation in the conspiracy was well established through evidence of events which occurred prior to February 18, 1971, the beginning date of the extension period interceptions. Accordingly, the court of appeals, after its own independent examination of the record, was correct in concluding (Pet. App. 140a–141a) that the evidence revealed by the four conversations that were introduced was merely cumulative as to them. Garnett's involvement was also established before February 18, 1971; in any event, she can have no objection to the introduction of these four calls because, as the court of appeals noted (Pet. App. 139a), none of them "referred to her directly or indirectly, and it was never claimed that they constituted proof of her participation in the conspiracy."

The remaining petitioners (Wright, Small, Mitchell, Dyson, and Nedd) argue that they should have standing to complain of interceptions, during the extension period, of conversations not introduced at trial. But this is beside the point because petitioners completely failed to allege even a single instance where such an interception led to evidence against them or prejudiced them in any way.[21] Since before the district court's hearing on the first remand (April–May, 1973), pe-

[21] Contrary to petitioners' assertion (Pet. 39–42), there is no inconsistency between the government's position with respect to its minimization efforts and its argument that any error in connection with the interceptions during the extension period was harmless. As we have shown above (*supra*, pp. 16–17), the government's efforts at minimization are legitimately informed at the time of the interceptions by its reasonable suspicions about the scope of the criminal enterprise under investigation and the likelihood that conversations to be intercepted will produce evidence of the illegal activity. Thus at the district court hearing on minimization the Assistant United States Attorney who supervised the interceptions testified, as petitioners point out (Pet. 40), that he allowed interceptions of seemingly innocent conversations to continue because the information gained from them "can be of extreme evidentiary value."

It is quite another thing to say, after the fact, that all of the calls the government might intercept consistent with minimization requirements *actually did* produce evidence, or investigative leads to other evidence, which was used to convict petitioners.

titioners have had available to them, and in connection with their claims relating to minimization have made extensive use of, the logs of the government agents who monitored the interceptions. These logs list every call intercepted, its date and duration, the participants (where they could be identified), and the gist of the conversation overheard.[22] The government's harmless error argument was raised in the district court on the second remand (November, 1974). Petitioners have thus had ample opportunity to show, but have not shown, either in the district court, the court of appeals, or here, that the interception of any call during the extension period to which they were party led to evidence against them which should not have been introduced at trial. The court of appeals correctly upheld the government's position in respect to harmless error "without reference to the investigatory use of the many conversations seized by the extension tap" (Pet. 39).[23]

In any event, the court below reached these issues

[22] Petitioners were also given copies of each "Report of Investigation" prepared by agents of the Bureau of Narcotics and Dangerous Drugs investigating this case between January 25, 1971 and March 16, 1971. These reports clearly indicate the progress of the investigation and all sources of information, whether obtained from visual surveillance, informants' advice, or the intercepted conversations. These reports and the logs of the intercepted conversations appear in volume 3 of the four volumes of hearing testimony and exhibits in connection with the district court hearing on minimization, see note 4, *supra*.

[23] Indeed, the only evidence of record on this issue is the testimony of Agent Handoga, one of the Drug Enforcement Administration agents most actively involved in the investigation of this case, that during the extension period most of the information that he received came from a government informant who was a member of the drug ring, and that he could recall no information that came from the wire interceptions (Hearing of October 10, 11, 1974, at 30–32).

of standing and harmless error only because it assumed that the interceptions during the extension period were unlawful. In our view, however, they were lawful: the district court correctly treated (Pet. App. 124a–136a) both telephones in the Garnett residence as a single unit.[24]

The Attorney General personally authorized the application for an order allowing interceptions over the first (and, at the time, only) telephone. The application was granted by Judge Travia on January 29, 1971: its expiration date was February 17, 1971. Bynum had learned of the planned surveillance, however, and had another telephone with a different number installed at the same premises before Judge Travia signed the order (Pet. App. 66a, n. 4; H. 655). When through interceptions over the first line the government learned of the existence of the second, the decision was made, again by the Attorney General himself, to apply for an order authorizing interceptions over the new line. The Attorney General approved the application on February 11 On February

[24] The court of appeals noted its agreement with petitioners "that 18 U.S.C. § 2518(5) contemplates an authorization procedure for extensions similar to that required for initial applications" (Pet. App. 140a; footnote omitted), and in so doing overruled the first ground of the district court's holding that the extension interceptions were properly authorized (*i.e.*, that the personal authorization of the Attorney General was unnecessary for extensions of interceptions initially authorized by him). The court of appeals did not refer, however, to the district court's alternative ground, which we urge was correct, that the two telephones were in effect a single unit.

12 Judge Travia granted it: its expiration date was March 3. Thereafter, on February 18, the government applied for, and Judge Travia granted, authorization to extend the time allowable for interceptions over the first line to coincide with the period authorized for surveillance of the second.

Although the extension application was approved by the Executive Assistant rather than by the Attorney General, we think it plain that the Attorney General had authorized electronic surveillance, of both the telephones and premises at 855 Linden Boulevard,[25] until March 3, and that, accordingly, the interceptions over line one during the extension period were not

[25] The papers sent to the Attorney General seeking his authorization for the second application to Judge Travia were accompanied by a covering memorandum of Executive Assistant Sol Lindenbaum to the following effect:

"On January 26, 1971, you approved a request by BNDD to tap the phone in the residence of Elvin Lee Bynum, a major narcotics dealer in Brooklyn who is suspected of engaging in operations that entail payoffs to New York City police and BNDD agents. You also approved an application for an order to install a microphone in Bynum's residence. BNDD obtained the order for both the tap and the bug but up to now has not been able to install the latter.

"Intercepted telephone conversations have confirmed Bynum's narcotics dealings only to a limited extent. It turned out that Bynum put a second phone in his home shortly before the tap began and is apparently receiving his more important business conversations on the new phone. *BNDD wants a 20-day tap on this new phone along with a new 20-day order for a bug to supersede the old order.*

"I agree with the Criminal Division that the statutory requirements of probable cause are met here."

(Government Exhibit PA8; pp. 168, 301, of the transcript of the October 10, 11 and November 9, 1974 hearing in the district court on the second remand; see the government's supplemental brief on their most recent appeal, at 7–8).

unlawful within the intent of Title III. The district court found as facts (Pet. App. 118a) that the

> two telephones were subscribed for in the same name * * *, located in the same private residential one family premises, and used by the same individuals for the same illegal purposes * * *

The district court also found (Pet. App. 119a) that the government's intention in this case, personally endorsed by the Attorney General, was to intercept all communications over all residential phone facilities in the premises during the period February 12 to March 3. Accordingly, the district court held (*ibid.*):

> Thus Attorney General Mitchell's personal approval on February 11, 1971 considered in light of all the circumstances, including his personal approval of the objective given on January 26, 1971, in effect authorized whatever application was necessary to pursue interception of communications over both telephones during the period February 12, 1971 to March 3, 1971, and the February 12, 1971 order *itself* in effect granted authority for a tandem or simultaneous tap on both phones. [Emphasis in original.]

This result is consistent with *United States* v. *Giordano, supra.* The decision to intercept wire communications at the Garnett residence, and indeed the decision to intercept them until March 3, were made personally by the Attorney General. Thus, "[t]he mature judgment of a particular, responsible Department of Justice official [was] interposed as a critical precondition" (416 U.S. at 515–516) to the judicial orders authorizing wire interceptions from January 29 until March 3. Given the identity of the users of and

communications passing over both telephones, we submit that in this case there was full compliance with the congressional intent "to condition the use of intercept procedures upon the judgment of a senior official in the Department of Justice that the situation is one of those warranting their use" (*id.* at 527). In short, the safeguards of the statutory scheme were satisfied in all meaningful respects by the Attorney General's screening and approval of the interception applications covering the entire period from January 29 to March 3, and the interceptions over the first line during the extension period were accordingly not unlawful.[26]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

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AUGUST 1975.

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[26] In addition to the issues raised in Pet. No. 74–1445, petitioner Birnbaum poses the question, without supporting argument, "whether the question of multiple conspiracies should void" his conviction (Pet. No. 74–6411, at 2, 4). But the court of appeals concluded that the government's evidence proved the existence of a single, rather than multiple conspiracies (Pet. App. 57a–61a), and petitioner suggests no reason why this holding was incorrect, or, if it was, how the variance prejudiced him. Further review of this issue is therefore not warranted.

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IN THE

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No. 74-1445

ELVIN LEE BYNUM, JOSEPH CORDOVANO, ABRAHAM WRIGHT, LANCE SMALL, NEWBRY MITCHELL, FANNIE MAE GARNETT, JACQUELINE FULLER DYSON, JOHN CONIGLIO, ANGELO MELI, VINCENT ALTAMURA, IRVING BIRNBAUM, CHARLES TUZZOLINO, and LEVIS NEDD,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

On Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE

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—v.—

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Respondent.

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---

REPLY BRIEF FOR PETITIONERS

Introduction

We respectfully submit that the Brief for the United States in opposition to the Petition amply demonstrates that several important questions are raised with respect to the statutory and constitutional requirements applicable to the administration of the Federal wiretap statute, 18 U.S.C. § 2510-§ 2520 [hereinafter, "Title III"].

In short, this Court has not interpreted the "necessity", "minimization", "standing", and "harmless error" concepts within the context of the requirements of Title III, nor has this Court ruled upon the constitutionality (Fourth Amendment Search and Seizure and Fifth Amendment Due Process) of Title III with respect to the application of these concepts.

To paraphrase Dean Prosser, the assault upon the citadel of *privacy* proceeds apace.[1] The authorization procedures, as well as the post-wiretap analysis and evaluation of those procedures, in the present case appear to reflect a general policy of lenity on the part of the Federal Circuit and District Courts with respect to the statutory and constitutional standards applicable to electronic surveillance by law enforcement officers.

A major underlying purpose of Title III was to protect the privacy of wire and oral communications by establishing comprehensive procedures for regulating the use of electronic surveillance. Judges who authorize the use of such surveillance must strictly adhere to the statute's procedures and the congressional intent behind the establishment of such procedures. The failure to do so defeats the very safeguards which motivated Congress to enact Title III and encourages an ever wider encroachment upon constitutionally protected liberties.[2]

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[1] Prosser, Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).

[2] See: *United States* v. *Giordano*, 416 U.S. 505 (1974); S. Rep. No. 1097, 90th Cong., 2d Sess. 67 (1968), at 214 (individual) view of Senator Scott), p. 220 (individual view of Senator Eastland), p. 225 (individual views of Senators Dirkson, Hruska, Scott, and Thurmond); Hearings on Controlling Crime Through More Effective Law Enforcement Before the Sub-Committee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. (1967), at p. 508 (statement of Senator McClellan); Senate Floor Debate on Title III: 114 Cong. Rec. 14474 (1968) (remarks of Senator Long); and Senator McClellan's remarks with respect to Report of the First Year of Operation of Title III, 115 Cong. Rec. 23240-1 (1969).

The instant Petition presents an ideal vehicle for this Court to authoritatively interpret the provisions in question. The record is a complete one and provides a detailed analysis of what, in fact, occurred. Since each of the statutory safeguards claimed to have been violated inter-relate with the others, the practical problems of administration, supervision and implementation are presented within a realistic context.

I.

The wiretap applications failed to establish necessity for the issuance of any electronic surveillance order.[3]

The government concedes that the information set forth in the initial wiretap application, "stated facts sufficient to constitute probable cause for the arrest of Bynum before the interceptions were authorized . . ." (Gov. Br., at p. 9). It contends, however, that, although Bynum was "the main target of the interception" the use of electronic surveillance was justified since: (1) "The investigation was directed at discovering the identity of other persons involved in a major widespread conspiracy" and (2) 'The facts in the affidavits were largely based on information from informants and included sufficient reasons to believe that these informants would refuse to testify against Bynum, thereby further

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[3] This issue is discussed at pp. 12-13, 28-30 of the Petition and at pp. 9-10 of the Government's Brief in Opposition. An excellent analysis of the history, purpose and implementation of the necessity requirement of Title III is to be found in Cooke, *Electronic Surveillance, Title III, and the Requirement of Necessity*, 2 Hastings Constitutional Law Quarterly 571 (Spring, 1975). A recent application of the necessity requirement in conformity with the view urged by petitioners is to be found in *United States* v. *Kalustian* (9th Cir., August 4, 1975; Docket No. 74-3314), — F.2d —.

establishing the necessity for the wire interceptions" (Gov. Br., at p. 9-10). This constitutes the totality of the government's response to our contention that the issuance of the wiretap orders violated the necessity requirements of 18 U.S.C. § 2518 §§(1)(c) and §§(3)(c).

The affidavit submitted in support of the initial wiretap application is set forth at H. 617-630 [4] and is dated January 28, 1971.

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[4] The following abbreviations are used in the Petition and in this Reply:

"—a"—is a reference to the petitioners' Appendix which was separately bound and filed with the Petition. The Appendix contains the three opinions of the Court of Appeals (Appendices A, C, & J, respectively), the two opinions of the District Court (Appendices B & I, respectively), the Court of Appeals orders denying rehearing (Appendices D, E, & K, respectively), the remand orders of this Court (Appendix G) and of the Court of Appeals (Appendix H), and the electronic surveillance provisions of 18 U.S.C. § 2510-§ 2520 (Appendix F).

Where appropriate, the three opinions of the Court of Appeals will be referred to as *"Bynum I"*, *"Bynum II"* and *"Bynum III"*, respectively.

"T—"—is a reference to the seven volumes of trial testimony and exhibits which constituted the Appellants' Appendix in the Court of Appeals upon the initial appeal. These volumes have been certified to this Court.

"H—"—is a reference to the four volumes of testimony and exhibits which resulted from the evidentiary hearing which was conducted in the District Court pursuant to the direction of the Court of Appeals in *Bynum I*. These volumes have also been certified to this Court.

"C—"—is a reference to the transcript of hearings held in the District Court with respect to the question of whether the Attorney General of the United States had authorized an application for an extension of the initial wiretap. Following that hearing, the Court of Appeals found that extension not to have been properly authorized (*Bynum III*, 138a-139a). In its Reply to the instant Petition, the government contests that finding by the Court of Appeals (Gov. Br., at pp. 20-24). For that reason, we will have a copy of the hearing transcript certified to this Court.

The affidavit reveals that four independent confidential informants, all previously having been demonstrated to be reliable, were providing the government with a substantial amount of valuable information with respect to all the criminal activities under investigation and with respect to Bynum's daily activities. The affidavit is *silent* as to whether those informants were providing information concerning Bynum's alleged co-conspirators. It is also *silent* as to whether those informants would be willing to testify for the government in a criminal proceeding. It does state that equipping an informant with clandestine recording equipment was considered to be too dangerous (H. 627) and that the informants were afraid they might be killed if their identities were to become known to Bynum (H. 628). This later assertion is made only within the context of the informants performing a more daring *investigative* function. As already indicated, no claim is made that the informants had refused to testify or that the informants had been offered protective custody or new identities or immunity from prosecution.

The affidavit alleges that Bynum's toll calls are important to the investigation and that the government had secured the telephone company records with respect to sixty-seven such calls. Verifying our contention that normal investigative methods had not been exhausted, the affidavit recites *"Time has not allowed a complete analysis of the toll information at the time of this affidavit*, but the toll records do reflect the same patterns of contacts as Bynum is known to have according to the information set forth in paragraphs numbered 5 and 9 above" (H. 625; emphasis added).

The affidavit sets forth no information concerning visual surveillance of Bynum, his premises or his associates. However, such visual surveillance was conducted on an extensive level as demonstrated by the

visual surveillance reports which were made available during the post-trial hearings in this case (H. 1065-1175).

Perhaps most important, is the failure of the affidavit to advise the Court with respect to the relationship which the government had with George Stewart, who testified at trial as the principal government witness. In December, 1970, Stewart agreed to become an informant for the government with respect to Bynum's activities (*Bynum II*, 54a). The Court of Appeals has accurately described Stewart as one, "who while acting as *a trusted key member* of the conspiracy, was simultaneously supplying the government with *detailed* information about the criminal activities of his associates." (*Bynum I*, 4a-5a). [Emphasis added]. Stewart allegedly bought, sold and stored narcotics for the conspiracy and dealt with each of the persons who were eventually indicted (*See*: *Bynum I* [1a-11a] and *Bynum II* [50a-61a]). Through to the point of the arrests in this case, Stewart "was fully accepted as a member of the core group" (*Bynum II*, 56a). During this period, he provided the government with samples of drugs he allegedly received from Bynum and Cordovano, advised the government as to the presence of wholesale lots of narcotics at particular premises, photographed substantial amounts of cash used in narcotics transactions, and tape recorded his own telephone conversations with Bynum and Cordovano. (*Bynum II*, 57a; Government Exhibits 1-4, 8, 13-15; T. 3193-3202, 3208, 3223-3227). In short, as found by the Court of Appeals:

> "[T]he detailed facts which amply document and support the government's case here, are uniquely provided by the informant-witness Sewart, whose regular reports to government agents enabled them to independently make surveillance and confirm the conspiracy and the overt acts charged in the indictment.***"

It is no wonder that the government's Brief in Opposition fails to make any effort to show that the application for the warrant satisfied the requirements of 18 U.S.C. § 2518(1)(c)[5] or to establish that the judge who issued the wiretap warrant was provided with a basis to conclude that the requirements of 18 U.S.C. § 2518(3)(c) had been satisfied.[6]

There can be no doubt that 18 U.S.C. § 2518 intended the use of electronic surveillance solely as "an investigative tool of last resort."[7] In *United States* v. *Kahn*, 415 U.S. 143 at 153 n. 12 (1974), this Court found that the necessity requirement is "designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime."[8]

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[5] I.e., that the application include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

[6] I.e., before authorizing a wiretap, the issuing judge is required to find that, "normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

[7] United States Department of Justice, *Manual for Conduct of Electronic Surveillance* (1969), at p. 18; to the same effect, *see*: Remarks of Senator McClellan, 115 Cong. Rec. 23240 (1969).

[8] Aside from the investigative techniques successfully used by the government, none of the possible investigative techniques already indicated were used by the government. Thus, for example, although Stewart reported to government agents that four and one-half kilos of cocaine, worth $45,000., were hidden in a particular house, the agents did not attempt to get a search warrant (T. 1487-8). Also, the government did not indicate in its application why a pen register could not have been used to record telephone numbers dialed on the telephones in question. *See*: *United States* v. *Focarile*, 340 F. Supp. 1033, 1038-41 (D. Md.), *aff'd sub nom. United States* v. *Giordano*, 469 F.2d 522 (4th Cir., 1972), *aff'd* 416 U.S. 505 (1974). Pen registers are not governed by the procedures established in Title III. *United States* v. *Giordano*, 416 U.S. 505, 548-53 (1974) (Powell, J., concurring in part and dissenting in part).

We respectfully submit that the necessity requirements of the statute are not met by a mere showing that normal investigative techniques would be *more difficult* to implement than electronic surveillance. The statutory requirement is that normal investigative techniques "be unlikely to succeed if tried or . . . too dangerous." 18 U.S.C. § 2518(1)(c) and 18 U.S.C. § 2518(3)(c). Particularly since this is the statutory implementation of a constitutional requirement,[9] boilerplate generalizations and conclusory allegations should not be followed by the perfunctory judicial grant of a wiretap order.

Since the statutory and constitutional requirement of necessity was not demonstrated—indeed, was not present—in this case, all of the resulting electronic surveillance should have been excluded from evidence. *United States* v. *Kalustian* (9th Cir., August 4, 1975; Docket No. 74-3314), — F.2d —.

II.

The government grossly failed to minimize the interception of irrelevant, innocent telephone conversations.[10]

We shall not repeat the documented factual analysis set forth in the Petition. The government's effort to establish a rational attempt to comply with the minimization requirements of the statute directly contradicts the record.

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[9] *Berger* v. *New York*, 388 U.S. 41, 60 (1967); *Katz* v. *Unite States*, 389 U.S. 347, 355 fn. 16 (1967); Brief for Appellant, (United States) at pp. 30-1, in *United States* v. *Giordano*, 416 U.S. 505 (1974); *A.B.A. Project on Minimum Standards for Criminal Justice—Standards Relating to Electronic Surveillance* (Approved Draft, 1971), at p. 104; Blakey & Hancock, *A Proposed Electronic Surveillance Control Act*, 43 Notre Dame Law. 657, 673 (1967-68).

[10] This issue is discussed at pp. 10-26, 30-35 of the Petition, and at pp. 10-17 of the government's Brief in Opposition.

The government's Brief in Opposition makes several assertions of policy which strike at the heart of the minimization requirement.

A. The government contends that the adolescent conversations of the teenage babysitter with her teenage friends were properly subject to interception since "some of these conversations described activities of the conspirators which provided useful leads" (Gov. Br., at p. 13). Thus, according to the government, if an innocent individual has innocent conversations in which she tells other innocent individuals that her employer is in the house or out of the house or having a conversation with someone, then such conversations can properly be intercepted (Gov. Br., at p. 13).

B. The government contends that it may intercept all of the conversations of an alleged conspirator, even though innocent in nature, because of the possibility that "at some time during an otherwise innocent conversation, she [the alleged conspirator] would say something that would be *useful* to the investigation, such as the identification of other persons involved in the ring" (Gov. Br., at pp. 13-14).

We respectfully submit that if the government is permitted to intercept, as they did here, all conversations which fall within the above noted two categories, then the minimization requirement is meaningless. The government's asserted right to intercept effectively extends to all conversations which pass over the telephone instrument since it can never be pre-determined whether something of "value" may be said. In this regard, "value" appears to mean anything concerning the movements or relationships of targeted individuals. Whether those activities are innocent or not. In essence, the government is arguing that it can eavesdrop on conversations in the same manner that it can "tail" people on the street.

III.

If the agents did, in fact, minimize the interception of conversations to the extent required by Title III, then the wiretapping in this case constituted a general search of the type prohibited by the Fourth Amendment of the United States Constitution.[11]

The government responds to our constitutional attack by merely asserting that "many decisions . . . have upheld the validity of 18 U.S.C. § 2510-2520 against challenges that the statute permits an unconstitutionally broad general search" (Gov. Br., fn. 19 at p. 17).[12] That assertion is an inartful attempt to sidestep the issue. As was stated in *United States* v. *Kalustian, supra,* slip sheet opinion at p. 5: "The Act has been declared constitutional only because of its precise requirements and its provisions for close judicial scrutiny." If, in fact, the precise requirements of the Act nevertheless result in an intrusion upon a constitutionally protected right, within the facts of a particular case, then the Constitution is violated.

We reassert our contention that if Title III authorizes the total interception which occurred during the extended period of electronic surveillance in this case, then Title III permits the issuance of a general warrant in violation of the Fourth Amendment.

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[11] This issue is discussed at pp. 36-37 of the Petition and in footnote 19 at p. 17 of the government's Brief in Opposition. With respect to this issue, *see*: Note, Minimization of Wire Interception: *Pre-Search Guidelines and Post-Search Remedies*, 26 Stan. L. Rev. 1411 (1974).

[12] This Court has never decided the issue of the constitutionality of Title III.

IV.

The use of conversations derived from the illegal extension tap was not harmless error.[13]

A total of eight telephone conversations were received in evidence at the trial. Six of these were between Bynum and Cordovano and two were between Bynum and Stewart (Gov. Exhibits 1-4, 8, 13-15; T. 3193-3202, 3208, 3223-3227). Four of those conversations were the product of the extension tap and were played for the jury (A. 2663, 2664, 2667, 2668). During the minimization hearing, the District Court explicitly found that "The inculpatory nature of these with picaune exceptions *is patent*" (14a—fn. 3) (emphasis added). Additionally, as quoted, in the Petition, at p. 42, the government argued in its brief in the Court of Appeals that the identification process in this case "was substantially based on information obtained from the wiretap." The government also argued in the Court of Appeals that the bulk of the intercepted conversations in this case were "of evidentiary value" to its investigation (H. 103).

In an effort to circumvent the illegality of the extension tap, it is now argued that the interceptions over that tap, constituted harmless error. In support of that contention, the government claims that the conversations used in evidence were "merely cumulative" as to the defendants Bynum and Cordovano (Gov. Br., at pp. 18-19 —fn. 20). As to the intercepted conversations not introduced into evidence, the government contends that petitioners have failed to show "a single instance where such an interception led to evidence against them or prejudiced them in any way" (Gov. Br., p. 19).

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[13] This issue is discussed at pp. 38-44 of the Petition and at pp. 17-21 of the government's Brief in Opposition.

At p. 43-4 of the Petition, we set forth the manner in which the government effectively utilized the four conversations in evidence. Having utilized an illegal tap, in violation of statutory and constitutional commands, the burden is upon the government to establish that this use was harmless beyond a reasonable doubt, *Chapman* v. *California*, 386 U.S. 18 (1967). Since this contention is conclusively refuted by the above quoted holding of the District Court and by the government's own contentions in the District Court and in the Court of Appeals, they should not be now heard to claim, in the face of the record, that the error was harmless.

With respect to the hundreds of other telephone conversations seized over the extension tap, the same arguments apply with equal force. That they were not placed directly in evidence is not controlling. If they were of assistance to the investigation (as the government claims they were), if they facilitated visual surveillance, if they resulted in the identification of alleged conspirators, or if they aided the government's direction of its informants during the investigation, then it was for the government to establish, beyond a reasonable doubt, that none of the fruit of the wiretapping enhanced the prosecution's case at trial.

When confronted with the harmless error ruling of the Court of Appeals, petitioners sought rehearing and, *inter alia*, requested that the Court of Appeals "remand the matter for a further factual hearing" as to the issue of harmless error. (Petition for Rehearing and Memorandum, pp. 4-5). Rehearing was denied (142a), and the instant Petition for a Writ of Certiorari was thereafter filed.

V.

The Court of Appeals erroneously held that certain of the petitioners do not have standing to contest the legality of the wiretaps.[14]

The government contends that none of the conversations of petitioners Coniglio, Meli, Altamura, Birnbaum and Tuzzolino were intercepted at any time. This assertion is erroneous as to petitioner Birnbaum.[15] As to the petitioners Wright, Small, Mitchell, Dyson and Nedd, the government alleges a lack of standing since none of their intercepted conversations were used in evidence and since those petitioners have not demonstrated any prejudice (Gov. Br., at pp. 18-20).

The government bottoms its standing argument upon a general citation, without explanation, to *Alderman* v. *United States*, 394 U.S. 165 (1969). *Alderman* concerned wiretaps which were executed and which were received in evidence prior to the enactment of Title III. Dicta in *Alderman*, 394 U.S. at 176, fn. 9, indicates that the standing criteria enunciated in Title III, 18 U.S.C. § 2518(10)(a) "should be construed in accordance with existing standing rules." However, the footnote in *Alderman* appears to overlook the fact that 18 U.S.C. § 2510(11) defines aggrieved person:

> " 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

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[14] This issue is discussed at pp. 44-47 of the Petition, and at pp. 18-20 of the government's Brief in Opposition.

[15] In fn. 28 at p. 46 of the Petition, we cite as examples of intercepted telephone calls by Birnbaum the conversations which are numbered W-2597, W-2600 and W-2602, which are logged at H. 984-5.

Thus, for the reasons advanced in the Petition, all of the petitioners have standing by virtue of the statutory definition.

VI.

The Court of Appeals properly held that the Court ordered extension of the first wiretap was illegal since that extension had not been authorized by the Attorney General.[16]

18 U.S.C. § 2516(1) provides that a Federal judge may issue a wiretap order only when the application for that order has been authorized by the Attorney General of the United States or by an assistant attorney general specially designated by the Attorney General. As with an original application, an extension application may only be made upon such authority, 18 U.S.C. § 2518(1) and § 2518(5).

At trial, in response to defense demands, the government filed with the trial court an affidavit of Sol Lindenbaum, the Executive Assistant to the Attorney General (A. 119). The affidavit revealed that the authorization for the February 18, 1971 extension of the "W" tap had been approved by Lindenbaum, "pursuant to the authorization which he [the Attorney General] had given to me to act in the circumstances and [I] caused his [the Attorney General's] initials to be placed on the memorandum to Will Wilson * * *" (A. 120). [Bracketed material added].

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[16] This issue is not discussed in the Petition since the Court of Appeals ruled in favor of the petitioners. However, the government now asserts that the Court of Appeals erroneously concluded that the interceptions during the extension period were unlawful (Gov. Br., at pp. 20-24).

The memorandum to which Mr. Lindenbaum referred is dated February 18, 1971, is addressed to Mr. Wilson, and states, in pertinent part:

> "Pursuant to the power conferred on me by § 2516 of Title 18, United States Code, you are hereby specifically designated to exercise that power for the purpose of authorizing Charles B. Updike to make the above described application" (A. 123).

Nowhere on the memorandum is it indicated that Mr. Lindenmaum had affixed the Attorney General's initials to the document, or, indeed, that Mr. Lindenbaum had anything to do with the document. The testimony of Mr. Mitchell and Mr. Lindenbaum at the hearing, unequivocally showed that no such authority had been given to Mr. Lindenbaum.

Upon the prior Petition for a Writ of Certiorari, this Court granted certiorari as to all petitioners, vacated the judgment, and remanded the case to the Court of Appeals for further consideration as to the issue of authorization in light of *United States* v. *Giordano*, 416 U.S. 505 (108a). The Court of Appeals then remanded the case to the District Court for further consideration as to that issue (109a-110a). Following an evidentiary hearing, the District Court issued its opinion, findings and conclusions, holding that a specific authorization of the extension tap was not legally required (110a-135a). The Court of Appeals rejected the holding of the District Court and agreed with the contention of petitioners Bynum and Cordovano that the extension wiretap had not properly been authorized (140a). However, the Court of Appeals found the use of the intercepted conversations to be cumulative and, thus, harmless error.

The government now contests the holding of the Court of Appeals and urges that the extension tap was properly authorized. The government's theory is bottomed upon the fact that the two distinct telephones were subscribed for in the same name, were located in the same one-family premises, and were allegedly used by the same individuals for the same illegal purposes. It follows, argues the government, that proper authorization to tap one of the telephones implicitly authorizes an extension of a prior tap on the other telephone (Gov. Br., at p. 23).

The government's extraordinary interpretation of 18 U.S.C. § 2518(5) is squarely contradicted by the provisions of Title III, by this Court's holding in *United States* v. *Giordano*, 416 U.S. 505, 94 S. Ct. 1820 at 1833-5, and by the testimony of former Attorney General Mitchell who testified in the hearing in this case as follows, under questioning by government counsel:

> "Q. In each of these procedures that you have described [with regard to authorization], was any distinction drawn between an original warrant and an application to the court to extend an original warrant, an extension? A. Not as to the procedure that would be followed with respect to the documentation and its flow through the Department of Justice, but of course in connection with an extension there were additional factors that had to be considered in connection with the product of the original surveillance" (C. 223).

We respectfully submit that this Court should squarely reject this bold effort by the government to liberalize the authorization procedures which were so strictly construed by this Court in *Giordano*.

CONCLUSION

For all of the above noted reasons, the Petition for a Writ of Certiorari should be granted; the judgments of conviction should be reversed, and a new trial should be granted.

Respectfully submitted,

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